Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CITY OF CHICAGO HEIGHTS and the
CHICAGO HEIGHTS ELECTION COMMISSION,

Petitioners,

v.

RON HARPER, KEVIN PERKINS,
WILLIAM ELLIOT and ROBERT MCCOY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the propriety of a proposed remedy of a Section 2(b) violation of the *Voting Rights Act* may be properly determined without analysis or consideration of the factors set forth in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986) and the corresponding Senate Reports.

2. Whether the adoption of an even-numbered city council elected by single member districts with a mayor elected at-large constitutes an adequate remedy of a violation of Section 2(b) of the *Voting Rights Act* where said form of government is approved by referendum but is rejected by the Court because the mayor acts in a tie-breaking capacity.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iii
Citations of Reports	1
Statement of Jurisdiction	1
Statement of the Case	9
Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved	1
Argument	19
Conclusion	26
Appendix	A-1

TABLE OF AUTHORITIES

Page

CASES

Flowers v. City of Moline, 622 N.E.2d 38 (3rd Dist. 1993) 25

Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. July 27, 2000) 1, 23

Hines v. Mayor and Council of Ahoskie, 998 F.2d 1266 (4th Cir. 1993) 22, 23, 24

Holder v. Hall, 512 U.S. 874, 114 S. Ct. 2581 (1994) .. 22, 23

Smith v. Brunswick Co., 984 F.2d 1393 (4th Cir. 1993) 22, 23, 24

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752 (1986) 20, 21, 22

OTHER AUTHORITIES

VOTING RIGHTS ACT OF 1965, 42 USC § 1971 .... *passim*

65 ILCS 5/4-1-2 7

65 ILCS 5/4-10-1 8

65 ILCS 5/6-1-1 8

65 ILCS 5/6-3-1 *et seq*..... 3

Rule 59, *Federal Rules of Civil Procedure*..... 17, 18

Rule 10, *Supreme Court Rules of the United States*..... 20

CITATIONS OF REPORTS AND OPINIONS

Harper v. City of Chicago Heights
223 F.3d 593 (7th Cir. July 27, 2000).....A-1

Harper v. City of Chicago Heights
Order Denying Petition for Rehearing (August 28, 2000).....A-26

McCoy v. City of Chicago Heights
6 F. Supp. 2d 973 (N.D. Ill. 1998).....A-28

Perkins v. City of Chicago Heights
47 F.3d 212 (7th Cir. 1995).....A-59

STATEMENT OF JURISDICTION

1. The judgment of the United States District Court for the Northern District of Illinois was issued on March 26, 1999. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 27, 2000. The United States Court of Appeals for the Seventh Circuit denied the petition for rehearing on August 27, 2000.

2. The statutory provisions conferring jurisdiction on this Court to review on a *Writ of Certiorari* the decision in question are 28 USC § 1254 and Rule 13.1 of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

SECTION 2 OF THE *VOTING RIGHTS ACT* (42 USC 1971 *et seq.*)

2. No person acting under color of law shall –

A. in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

B. deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

C. employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to Title III of the *Civil Rights Act of 1960* (42 USCA § 1974 *et seq.*): *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

SECTION 5/6-3-1 et seq. OF THE *ILLINOIS MUNICIPAL CODE*, 65 ILCS 5/6-3-1 (Strong – Mayor form of Government)

5/6-3-1. Initial division into wards

§ 6-3-1. Initial division into wards. Not later than 30 days prior to the first day on which candidate petitions may be filed for the primary election at which the first municipal officers are to be nominated for office under this Article 6, the corporate authorities shall divide the municipality into wards pursuant to Section 6-3-5.

5/6-3-2. Termination of terms of office

§ 6-3-2. Termination of terms of office. The terms of office of all elected municipal officers holding office at the time of the issuance of the certificate of adoption of the strong mayor form of government by the municipality pursuant to Division 2 of this Article 6 shall terminate upon the election and qualification for office of municipal officers pursuant to this Division 3 of Article 6, except that where an existing form of municipal government has the same number of wards as would be required hereunder, the aldermen holding office at the time of the issuance of the certificate of adoption shall serve until the expiration of the terms for which they were elected.

5/6-3-3. Municipal officers – Terms

§ 6-3-3. Municipal officers – Terms. The municipality shall have the following elected officers: one mayor, one municipal clerk and one municipal treasurer, all of whom

shall be elected at large, and aldermen, the number of which shall be as follows: In cities not exceeding 25,000 inhabitants, 8 aldermen; between 25,001 and 40,000, 10 aldermen; between 40,001 and 60,000, 14 aldermen; between 60,001 and 80,000, 16 aldermen; and exceeding 80,000, 20 aldermen. Two aldermen shall be elected to represent each ward.

5/6-3-4. Terms of office

§ 6-3-4. Terms of office. All terms of office of officials elected pursuant to this division 3 of Article 6 shall be for terms of 4 years, except that aldermen elected at the first election for city officers held pursuant to this Article 6 shall draw lots so that one-half of the aldermen shall hold for a 4 year term, and until their successors are elected and qualified, and one-half of the aldermen shall hold for a 2 year term, and until their successors are elected and qualified. All aldermen thereafter elected shall hold office for a term of 4 years, and until their successors are elected and have qualified.

5/6-3-5. Division into wards

§ 6-3-5. Division into wards. Every city shall have as many wards as one-half the total number of aldermen to which the city is entitled. The city council, from time to time shall divide the city into that number of wards. In the formation of wards the population of each ward as determined by the latest city, state or national census shall be as nearly equal and the wards shall be of as compact and contiguous territory, as practicable.

5/6-3-6. Redistricting of city

§ 6-3-6. Redistricting of city. Whenever an official publication of any national, state, school, or city census shows that any city contains more or less wards than it is entitled to, the city council of the city, by ordinance, shall redistrict the city into as many wards only as the city is entitled. This redistricting shall be completed not less than 30 days before the first date on which candidate petitions may be filed for the next succeeding general municipal election. At this election there shall be elected the number of aldermen to which the city is entitled.

5/6-4-1. Mayor

§ 6-4-1. Mayor. The mayor shall be recognized as the official head of the city or village by the courts for the purpose of serving civil process and by the governor for all legal purposes.

The mayor of any city or village which adopts this Article 6 shall have veto power as provided in Sections 6-4-2 through 6-4-4 and ordinances or measures may be passed over his veto as therein provided. Such mayor shall have the power to vote as provided in Section 6-4-5.

If any other act or any article of this *Code* other than Article 3 or Article 4 provides for the appointment of a board, commission or other agency by the mayor and the corporate authorities establish such board, commission or agency, such appointments shall be made in manner so provided.

5/6-4-2. Ordinances – Approval – Veto

§ 6-4-2. Ordinances – Approval – Veto. All ordinances passed by the council shall be deposited with the city or village clerk. If the mayor approves of them, he shall sign them. Those of which he disapproves he shall return to the council, with his written objections, at the next regular meeting of the council occurring not less than 5 days after their passage. The mayor may disapprove of any one or more sums appropriated in any ordinance, resolution, or motion making an appropriation, and, if so, the remainder shall be effective. However, the mayor may disapprove entirely of an ordinance, resolution, or motion making an appropriation. If the mayor fails to return any ordinance or any specified resolution or motion with his written objections, within the designated time, it shall become effective despite the absence of his signature. The vote on every ordinance shall be by yeas and nays, and shall be recorded in the journal.

5/6-4-5. Mayor – Voting Resolution.

§ 6-4-5. Mayor – Voting resolution. The mayor shall not vote on any ordinance, resolution or motion except: (1) where the vote of the aldermen has resulted in a tie; or (2) where one-half of the aldermen elected have voted in favor of an ordinance even though there is no tie vote; or (3) where a vote greater than a majority of the corporate authorities is required by this *Code* to adopt an ordinance, resolution or motion. In each instance specified, the mayor shall vote.

Nothing in this section shall deprive an acting mayor from voting in his capacity as alderman, but he shall not be entitled to another vote in his capacity as acting mayor.

REFERENDUM

The Referendum submitted to the voters of the City of Chicago Heights stated in relevant part:

PUBLIC NOTICE

NOTICE IS HEREBY GIVEN that at the nonpartisan election to be held on Tuesday, the 7th day of November, 1995, the following propositions will be submitted to the voters of the City of Chicago Heights, Cook County, Illinois.

QUESTION 1. Should the City of Chicago Heights abandon the commission form of government, whereby a mayor and four council members are elected at large?

Specifications:

The commission form of government, 65 ILCS 5/4-1-2, was the form of government under which the City held its elections prior to the February 28, 1995, primary election.

QUESTION 2. Should the City of Chicago Heights adopt a modified strong mayor form of government with a mayor elected at large, and six alderpersons elected for six single member wards, one alderperson per ward?

Specifications:

The modified strong mayor form of government is the form of government under which the City has operated since the April 4, 1995 election. In the April 4, 1995 election, a mayor was elected at large, and six alderpersons were elected from six single member wards, one alderperson per ward. The wards were designated one through six, and the legal description of each ward follows this notice.

If the statutory strong mayor form of government is not modified, it will result in the election of ten alderpersons from five wards, two alderpersons per ward. The mayor would be elected at large. 65 ILCS 5/6-1-1.

QUESTION 3. Should the mayor of the City of Chicago Heights appoint the city clerk and city treasurer with such appointments to be confirmed by the city council?

Specifications:

Previous to the April 4, 1995 election, the city clerk and city treasurer were appointed by the Mayor and confirmed by the City Council.

Question One may be required by state law to appear on the ballot when a municipality wishes to change its form of government from the commission form. 65 ILCS 5/4-10-1. Prior rulings in this case have already held that:

a. The black community in Chicago Heights is sufficiently compact and contiguous to form a voting age population majority in two of seven districts.

b. The black community in Chicago Heights is politically cohesive.

c. The white majority community in Chicago Heights votes sufficiently as a bloc (in city-wide at-large elections) to enable it, in the absence of special circumstances, to usually defeat that black community's preferred candidate. (J. Nordberg Opinion, May 14, 1993, pp. 13-14).

This question appears on the ballot because it may be required by state law.

STATEMENT OF THE CASE

1. Initial Proceedings

On June 8, 1987, Plaintiffs Robert McCoy and Kevin Perkins (hereinafter "Plaintiffs"), and Ron Harper and William Elliot filed a Complaint for Injunctive and Other Equitable Relief in the United States District Court for the Northern District of Illinois against the City of Chicago Heights, Cook County, Illinois and the Chicago Heights Election Commission. On November 17, 1988, Plaintiffs filed an action with similar allegations, naming the Chicago Heights Park District and Stanley Kusper, Clerk of Cook County, Illinois, as Defendants. Both Complaints alleged that the non-partisan at-large, district-wide elections utilized to elect representatives to the Chicago Heights City Council and Chicago Heights Park District Board violate Section 2 of the *Voting Rights Act of 1965*, 42

USC § 1971, *et seq.*, by diluting the opportunity for members of the Plaintiff Class to elect representatives of their choice to the respective governmental bodies.

On January 29, 1988, the Plaintiff Class filed a motion to maintain a class action and for certification of the Class, with affidavits in support thereof from Ron Harper, William Elliot, Robert McCoy and Kevin Perkins. This motion was granted by the District Court on April 28, 1994. The Class was defined as:

> All African-American citizens of the United States residing in the geographic confines of 1) The City of Chicago Heights, or 2) the Chicago Heights Park District.

In February of 1989, both Plaintiffs and Defendants filed motions for summary judgment with regard to the City case. On January 28, 1992, the District Court Magistrate issued a report and recommendation stating that partial summary judgment should be granted in favor of the Plaintiffs with respect to the following issues:

a. That the black community in Chicago Heights is sufficiently compact and contiguous to form a voting age population majority in two of seven districts; and,

b. That voting in Chicago Heights is racially polarized.

On May 14, 1993, the District Court issued a Memorandum Opinion and Order adopting the Magistrate Judge's findings. The District Court also ruled that there was no genuine issue of material fact with regard to the following issue: that the white majority community in Chicago Heights votes sufficiently as a block to enable it,

in the absence of special circumstances, to usually defeat the black community's preferred candidate. However, at that time, there was no finding of liability against the City or Park District, and genuine issues of material fact still existed with regard to the following factors:

a. Whether the at-large election system in Chicago Heights enhances the opportunity for discrimination against the black voters;

b. Whether blacks in Chicago Heights are denied access to the slating process;

c. Whether blacks in Chicago Heights have been victims of official discrimination in the form of political gerrymandering;

d. Whether black residents of Chicago Heights bear the effects of historic socioeconomic discrimination in the areas of housing, employment, education, and public accommodations which hinder their ability to participate effectively in the political process.

On September 13, 1993, the City and Park District cases were consolidated.

2. The Consent Decree

At a series of pretrial mediation conferences with the District Court, both the Plaintiff Class and Defendants submitted a series of proposed voting maps. As a result of these conferences, the Plaintiff Class and Defendants agreed upon a voting map providing for six single-member districts and revised forms of government for the City and Park District. On January 6, 1994, Plaintiffs Perkins

and McCoy (hereinafter referred to as "Dissenting Plaintiffs") filed a "motion objecting to disregarding named Plaintiffs Kevin Perkins and Robert McCoy during settlement negotiations." At a hearing on January 6, 1994, the District Court denied the motion on the grounds that it was without justification.

At the direction of the District Court, the parties held a public hearing on April 25, 1994, at 7:30 p.m., in the Chicago Heights Municipal Building with regard to the proposed forms of government and voting maps. These proceedings were transcribed, videotaped and introduced into evidence at a Fairness Hearing held by the District Court on May 18, 1994. On May 24, 1994, the District Court approved the Consent Decree and entered corresponding Findings of Fact and Conclusions of Law, and a Judgment Order.

3. The First Appeal

Thereafter, on May 31, 1994, Dissenting Plaintiffs Perkins and McCoy filed a motion for a new trial. On June 10, 1994, the District Court denied Dissenting Plaintiffs' motion. On June 15, 1994, the Plaintiff Class and Defendants filed an agreed motion to revise the Consent Decree on the grounds that the Consent Decree was unclear about the City Council's power to confirm the appointment of the City Clerk and City Treasurer appointed by the Mayor. The District Court granted this motion on June 15, 1994. The revised Consent Decree was unchanged, except to clarify that the City Council would

approve the Mayor's appointment of a Clerk and Treasurer. Dissenting Plaintiffs subsequently filed a Notice of Appeal on June 17, 1994.

On February 7, 1995, the United States Court of Appeals for the Seventh Circuit found that the following modifications to state law had been made in the consent decree entered into between the parties:

a. Instead of a commission form of government, the City would reorganize under the strong mayor form of government;

b. Instead of five wards with two alderpersons elected per ward, the decree provides for six wards with one alderperson elected per ward;

c. Instead of electing the City Treasurer and Clerk, these positions will be appointed by the Mayor with the approval of the Council;

d. The consent decree allows the Mayor to appoint administrative assistants and a budget and finance director, not provided for in the statute for municipalities the size of Chicago Heights;

The Court of Appeals vacated the consent decree and stated:

> [A] change to the strong mayor form of government, and at least certain modifications to the statutory system, must normally be accomplished through a referendum. Upon properly supported findings that such a remedy is necessary to rectify a violation of federal law, the district court can approve a consent decree which overrides state law provisions.

Based on its conclusion that there were insufficient findings to justify the aforementioned modifications, the Court of Appeals vacated the consent decree and remanded the case to the District Court for further proceedings.

4. The Elections and The Referendum

A local primary election of February 28, 1995, proceeded as scheduled under the vacated consent decree pursuant to a local state court order. On March 28, 1995, the District Court ruled that: 1) the general election scheduled for April 4, 1995 should also proceed as planned; and 2) a referendum should be held at the next regularly scheduled election (after the April 4, 1995 election) to validate the form of government under which the election was held.

In July of 1995, the District Court requested that the parties prepare the referendum questions to appear on the ballot on November 7, 1995. On November 7, 1995, the voters approved the City's new strong mayor/aldermanic form of government, passing all three questions contained in the referendum.

5. The District Court's 1995 Orders

Following the referendum, the District Court entered several orders which were as follows:

a. The court reentered an attorney fee award that it had previously awarded to counsel

for the Plaintiff Class (which had been previously vacated by the Court of Appeals, along with the consent decree).

b. The Court denied the motion to intervene filed by two individuals who were currently involved in a state court action with regard to a recount of ballots.

c. The Court denied the motion to reconsider filed by Dissenting Plaintiffs on April 3, 1995.

6. The August 1996 Trial

Following the case's reassignment to the Honorable David H. Coar in the District Court, the Plaintiff Class filed a motion to dismiss this case as moot, arguing that the referendum had obviated the need for any further action in this matter. On June 13, 1996, the District Court ordered that a hearing would be held on the motion on August 14 and 15, 1996, and that the hearing on the motion would also be a fairness hearing, in that the parties could present witnesses and expert witnesses in support of their positions. On July 2, 1996, the District Court approved a publication notice with regard to the hearing, intended to reach all members of the Plaintiff Class. The fairness hearing/hearing on the motion to dismiss the case as moot was held on August 15 and 16, 1996.

7. The District Court's Finding Of a Violation of Section 2b of the *Voting Rights Act*

On March 4, 1997, the District Court issued its memorandum, opinion and order with respect to the hearing

previously held in August of 1996. In its opinion, the District Court found that the City's form of government enacted pursuant to the vacated consent decree, was validly enacted under Illinois law at least since November 7, 1995, the date of the referendum. The District Court also found that the City's prior form of government, the commission form of government, violated Section 2 of the *Voting Rights Act*. The District Court ordered the parties to submit remedial plans and accompanying memoranda in order to determine whether the new forms of government in the City and Park District remedied the *Voting Rights Act* violations.

8. The Remedial Submissions

The City of Chicago Heights submitted a memorandum supporting its current form of government, previously enacted by the consent decree, and approved by referendum. Subsequently, the City submitted a six-district voting map and racial breakdown charts. While the six districts contained in the City's submission were nearly identical to the districts enacted as a result of the consent decree, some small changes were made to district boundaries. It was the City's position that the previous districts had been drawn with race as a primary consideration, and that, given recent United States Supreme Court decisions, such consideration was no longer proper. The Plaintiff Class submitted a remedial plan which supported the form of government and districts currently in place in the City of Chicago Heights with no changes. The Dissenting Plaintiffs submitted a remedial plan which

provided for seven districts and an aldermanic form of government.

9. District Court Remedy

On May 28, 1998, the District Court issued its memorandum, opinion and order with respect to the remedial plans submitted by the parties. The order rejected the proposed remedial plans of the City as well as the proposed plan of the Plaintiff Class and the Defendant Chicago Heights Park District. The District Court adopted, in part, the remedies suggested by Dissenting Plaintiffs and instituted a hybrid of the aldermanic form of government with seven elected representatives. The District Court also instituted, *sua sponte*, an at-large election system with cumulative voting for the seven aldermen who would serve four year terms. The Mayor, City Treasurer and City Clerk would be elected at large.

10. Post-Judgment Matters

A motion to alter or amend judgment pursuant to Rule 59(e) of the *Federal Rules of Civil Procedure* was filed by the City of Chicago Heights on June 8, 1998. The Chicago Heights Park District and the Plaintiff Class also filed Rule 59(e) motions with respect to the May 28, 1998 order. These motions were denied by the District Court on June 18, 1998. A notice of appeal was filed by the City of Chicago Heights on July 10, 1998. Thereafter, the Chicago Heights Park District and the Plaintiff Class filed notices of appeal on July 15, 1998.

On July 30, 1998, the parties appeared before the District Court with regard to a motion filed by the Cook County Clerk pursuant to Rule 60(b) of the *Federal Rules of Civil Procedure* on July 14, 1998. At that time, the District Court indicated that it would treat the County's Rule 60(b) motion as a motion pursuant to Rule 59(e) of the *Federal Rules of Civil Procedure*, as it had yet to enter the judgment order at the time of the filing of the County Clerk's motion. The judgment order was officially entered in this case on July 27, 1998. The County Clerk's Rule 59(e) motion was denied by the District Court on July 30, 1998, but the District Court did amend its May 28, 1998 order to provide for equal and even cumulative voting.

The City re-filed its notice of appeal on August 6, 1998. Thereafter, the Plaintiff Class and Chicago Heights Park District re-filed their notices of appeal on August 10 and August 11, 1998, respectively. By order dated August 13, 1998, the Court of Appeals consolidated all of the appeals.

11. The Second Appeal

On July 27, 2000, the Court of Appeals ruled that the District Court's May 28, 1998 order:

a. correctly considered whether the form of government adopted through referendum would remedy the Section 2 violation;

b. correctly considered evidence of the mayor's pattern of voting in tie-breaking situations to support the referendum system's failure to remedy the *Voting Rights Act* violation;

c. did not need to consider each of the *Gingles* and Senate Report factors in evaluating the limited use of the at-large voting system in the referendum system;

d. the remedy was inappropriate as it did not follow required statutory procedures for changing the election methods in the *Illinois Municipal Code*, nor did it make a judicial finding that it was necessary to make said changes to comply with federal law;

e. the District Court's remedy failed to respect the city's preference for single member districts;

f. the District Court properly accepted the proposed hourly rates as they related to the fee awards.

On August 10, 2000, the City of Chicago Heights filed its petition for rehearing with a suggestion for rehearing *en banc*. This petition was denied by the Court of Appeals on August 27, 2000.

ARGUMENT

1. The District Court's And Court Of Appeals' Decisions Regarding The Reach Of The *Voting Rights Act* Conflict With Decisions Of The United States Supreme Court And The United States Courts Of Appeals.

Among the reasons this Court considers in granting a writ of certiorari include an examination of a ruling by a United States Court of Appeals which is in conflict with relevant decisions of this Court and/or in conflict with

the decision of another United States Court of Appeals. *Rule 10(a) and (c) of the Supreme Court Rules of the United States*. For the reasons set forth below, the Court of Appeals' decision in this case conflicts with relevant decisions of this Court, the United States Court of Appeals for the Fourth Circuit, and with a previous decision by the Court of Appeals for the Seventh Circuit in the same case. Accordingly, this Court should grant this petition.

A. The Court of Appeals' decision conflicts with this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 2765 (1986), this Court set forth three factors which must be considered in determining whether an election scheme violates Section 2 of the *Voting Rights Act*. The Court of Appeals in this case, however, upheld the District Court's determination that the city's proposed remedy violated Section 2 without consideration or analysis of the *Gingles* factors.

In *Gingles*, this Court stated that certain circumstances must exist to find that a voting structure operates "to impair minority voters' ability to elect representatives of their choice." 106 S. Ct. at 2765. Those circumstances include:

1) The minority group must be sufficiently large and geographically compact to constitute a majority in any single-member district;

2) The minority group must be able to show that it is politically cohesive;

3) The minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate. *Gingles*, 106 S. Ct. at 2766.

The District Court failed to pay any deference to any of these factors, or those prescribed in the Senate Judiciary Committee Report on the amended Section 2 of the *Voting Rights Act*, but instead issued a blanket determination that the referendum endorsed form of government proposed by the City violated Section 2. In fact, the District Court simply stated that, "(o)n its face, this system made it more difficult for African-Americans to *elect* their candidates of choice because of a need to overcome the preferences of the white majority." [emphasis supplied.]

The Court of Appeals noted this deficiency when it stated that, "[t]he District Court recognized that courts have relied upon the three factors set forth in *Gingles*, followed by the nine 'Senate Report Factors', in order to decide whether or not a violation of Section 2 exists. . . . Using it, Judges Nordberg and Will evaluated the original plan proposed to remedy the violation, but Judge Coar did not perform a similarly detailed evaluation of the referendum plan. . . . " The Court of Appeals also noted that, "[a]ppellate review might have been somewhat easier if the district court had discussed each of the *Gingles* and Senate Report Factors in its evaluation of the limited use of at-large procedures found in the referendum system. . . . " Nonetheless, the Court of

Appeals, in direct contravention of the framework prescribed under *Gingles* and its progeny, affirmed the District Court's rejection of the referendum system. Given the lower court's complete failure to follow *Gingles* and the requirements set forth therein, this Court should exercise its discretion to hear this case.

B. The Court Of Appeals' decision conflicts with decisions of the United States Courts of Appeals for the Fourth Circuit.

It is well established that the *Voting Rights Act* ensures only "the right to have free and equal access to the ballot box and to have the vote that is cast count the same as any other person's, but it does not endow the voter with the right to have his or her vote cast for the winner". *Hines v. Mayor and Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993), *citing Smith v. Brunswick Co.*, 984 F.2d 1393, 1398 (4th Cir. 1993). The above cases demonstrate that only the opportunity to vote is protected, rather than the opportunity to pass certain ordinances or run government as one sees fit.

In this case, however, the lower court did not analyze whether the referendum remedy resulted in denial of access to the polls. Instead, the lower court merely stated that the limited at-large system (mayor only), which was ratified by referendum, was discriminatory on its face. Such a blanket finding is precisely what Justices Thomas and Scalia warned against in their concurrence in *Holder v. Hall*. 512 U.S. 874, 114 S.Ct. 2581 (1994). In that decision, Justice Thomas specifically questioned the validity of the finding of a Section 2 violation which concerns

only the type of electoral system, not whether minority voters have full "access to the ballot". *Holder v. Hall*, 114 S. Ct. at 2607 (Thomas and Scalia concurring). Specifically, Justice Thomas stated, "[t]he section [referring to Section 2] does not cover, however, the choice of a multi-member over a single-member districting system or the selection of one set of districting lines over another, or any other such electoral mechanism or method of election that might reduce the weight or influence a ballot may have in controlling the outcome of an election." *Id.*

The Court of Appeals improperly expanded the scope of the *Voting Rights Act* by concluding that the referendum remedy was insufficient solely because the white mayor casts tie-breaking votes and does so (or could do so) against the minority council members. *Harper*, 223 F.3d 593, 600. The Court of Appeals boldly held that, "[t]he evidence of the mayor's pattern of voting in tiebreaking situations, taken with the likelihood of ties on an even-numbered council, is enough to support the district court's conclusion that the referendum system did not adequately address the acknowledged problem in the City elections." This ruling conflicts with *Hines* and *Smith*, as it improperly expands the reach of the *Voting Rights Act* to guarantee a certain result, not merely participation. 998 F.2d 1266; 984 F.2d 1393.

By so ruling, the Court of Appeals effectively has held that the only approvable remedy in Chicago Heights is one under which minority voters and their candidates are guaranteed success in implementing the agenda of their choice. This judicial leap takes the *Voting Rights Act*

beyond ensuring equal participation and, instead mandates *minority control* of the Chicago Heights City Council. Under the Court of Appeals ruling, the only way to remedy a previously found Section 2 violation would be to implement a system which ensures that minority candidates elected to the City Council will not be out-voted by the remaining Council members and then, the Mayor, in cases of a tie vote. The only way to accomplish this result is to give the minority candidates numerical control of the City Council, thereby guaranteeing their agenda will not be voted down by the "white majority" in the City. Clearly, this conflicts with the holdings in *Hines* and *Smith* from the Fourth Circuit concerning the protections afforded by the *Voting Rights Act*. Moreover, such a result stands participatory democratic principles on their head by eliminating the most fundamental tenet of majority (numerical) rule.

The current City Council consists of six alderpersons: two African-American, one Hispanic, and three Caucasian. Given this configuration, it is apparent that minority voters have successfully exercised their right to vote and have secured the election of three minority representatives. The *Voting Rights Act* should not be used to assure any of the City's aldermen (regardless of their race) that his agenda will succeed. However, this is precisely the effect of the Court of Appeals' decision. Given this undue expansion of the protections afforded by the *Voting Rights Act*, and the resulting conflict with other Court of Appeals' decisions concerning the Act's protections, this Court should exercise discretion to hear this case.

C. The Court of Appeals' nullification of a democratically run referendum contradicts its previous decision.

The Court of Appeals' previous decision in this case cited *Flowers v. City of Moline* for the proposition that the voters' approval of the modified strong mayor form of government would fulfill the remedial obligations of the City under Section 2 of the *Voting Rights Act*. *Flowers v. City of Moline*, 622 N.E.2d 38, 41 (3rd Dist. 1993). However, on the subsequent appeal, the Court of Appeals discounted the importance of the referendum approving the modified strong mayor form of government. This ruling shows a complete disregard of the Court of Appeals' prior holding as it pertains to the referendum.

The Court of Appeals' 1995 decision states, "we note that one Court has stated that a city can, consistent with the Illinois Constitution, first alter a statutory form by ordinance and then adopt that form through referendum." (*Citing Flowers v. City of Moline*, 622 N.E.2d at 41). The City followed this mandate and submitted the modified strong mayor form of government to the voters for their approval by referendum. On November 7, 1995, the voters approved the City's new form of government, passing all three questions contained in the referendum. This action, according to both the Court of Appeals' prior decision and *Flowers*, should be sufficient to support the City's remedial plan.

The decision now at issue acknowledges that the referendum took place at the behest of the Court of Appeals, yet disregards the results of the referendum. As a result, the City is left with a void referendum result,

despite the overwhelming choice of the voters (including significant numbers of minority voters), to approve the form of government proposed and enacted by the City. Most problematic is that the judicial dismemberment of petitioners' form of government occurred because the Court of Appeals improperly found (for the reasons set forth above) that the mere fact that the Mayor votes to break ties on this City Council is enough to reject the referendum remedy. Because this ruling improperly expands the reach of the *Voting Rights Act*, the Court of Appeals wrongly disregarded its prior ruling and incorrectly invalidated the referendum remedy. Accordingly, this Court should exercise its discretion to hear this case.

CONCLUSION

Based upon the direct conflict between the Court of Appeals' decision in this case and decisions of this Court and other United States Courts of Appeals, this Court should exercise its discretion to hear this case. This Court should grant the City's petition so that it may clearly establish the appropriate scope of the protections provided by the *Voting Rights Act* and the standards to be

employed to determine the sufficiency of proposed remedies of violations of the Act.

Respectfully submitted,

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United States Court of Appeals,
Seventh Circuit.

Ron HARPER, Kevin Perkins, William Elliot, and Robert McCoy, Plaintiffs-Appellees, Cross-Appellants,
v.
CITY OF CHICAGO HEIGHTS and the Chicago Heights Election Commission,
Defendants-Appellants, Cross-Appellees,
Ron Harper, Kevin Perkins, William Elliot, and Robert McCoy, Plaintiffs-Appellees, Cross-Appellants,
v.
Chicago Heights Park District, Defendant-Appellant, Cross-Appellee,
and
David Orr, Cook County Clerk, Defendant-Appellee.
Nos. 98-2785, 98-2811, 98-2899, 98-3004, 98-3051, 98-3075, 99-2007, 99-2008, 00-1503, 00-1515[1]

Argued April 6, 1999
Decided July 27, 2000

Rehearing and Rehearing En Banc
Denied Aug. 28, 2000.

James C. Craven (argued), Donald M. Craven, Craven & Thornton, Springfield, IL, J. Timothy Eaton (argued), Ungaretti & Harris, Judith Reed (argued), Depaul University, Michael P. Seng, Robert L. Anderson, Krohn, Jenkins & Anderson, Chicago, IL, for plaintiffs-appellees.

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[1] There was also one other appeal initially brought by the Chicago Heights Park District (98-2798); this appeal was dismissed on the Park District's motion before briefing and oral argument.

Anthony A. Scariano (argued), Kelly A. Hayden, Scariano, Ellch, Himes, Sraga & Petrarca, Imelda Terrazino, Clausen Miller, David Lincoln Ader (argued), Ancel, Glink, Diamond, Cope & Bush, Donna M. Lach, Office of the State's Attorney of Cook County, James J. Casey, Ross & Hardies, Chicago, IL, for defendants-appellants.

Louise A. Lerner, Department of Justice, Civil Rights Division, Appellate Section, Washington, DC, for amicus curiae U.S.

Before KANNE, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

The wheels of justice have turned slowly in this voting rights case, which began more than a decade ago and continues to accrete new appeals almost by the month. The finding of a violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1971 et seq., has long since been established. Part of the case before us concerns the remedy for that violation. The district court issued an opinion on May 28, 1998, in which it ordered the implementation of a new election method that relies on cumulative voting. The rest of the many appeals consolidated with the case, up to and including those filed in the early spring of the year 2000, concern attorneys' fees. With respect to the remedy, we have reluctantly concluded that the district court moved too quickly in its understandable desire to put this case to rest. We therefore must reverse and remand. This in turn leads us to affirm in part and reverse in part the district court's grant of attorneys' fees and expenses.

I

The facts and procedural history of this case are set forth in detail in previous opinions. *See Harper v. City of Chicago Heights*, 824 F.Supp. 786 (N.D.Ill.1993); *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir.1995); *Harper v. City of Chicago Heights*, 1997 WL 102543 (N.D.Ill. March 5, 1997). To summarize, in 1987 Ron Harper, Kevin Perkins, William Elliot, and Robert McCoy ("the Class") filed a class action against the City of Chicago Heights ("the City"), alleging that the at-large election method used to elect representatives to the City Council diluted the voting strength of African-Americans in violation of Section 2. In 1988, the Class filed an almost identical suit against the Chicago Heights Park District ("the Park District") aimed at changing the at-large election method used to select the Park District Board. (Although the Chicago Heights Election Commission and the Clerk of Cook County were also named as nominal defendants, these cases have been defended by the City and the Park District.) The district court ultimately consolidated the claims and certified the Class.

The Class wanted the court to order the replacement of the at-large voting systems with single-member districts and to award it attorneys' fees and costs. In February 1989, all parties moved for summary judgment. District Judge Nordberg denied the defendants' motion and granted in part and denied in part the Class's motion. He held that the Class had proven the three *"Gingles"* factors, *see Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), that are threshold

requirements to a Section 2 vote dilution claim.[2] *See Harper*, 824 F.Supp. at 792-93. However, he concluded that genuine issues of material fact remained with regard to the second step to proving a vote dilution claim, the so-called "Senate Report Factors," *see* S.Rep. No. 417, 97th Cong., 2d Sess. 2, 28-29 (1982).[3] The cases were then reassigned to District Judge Will for trial.

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[2] Those three factors are the preconditions the Supreme Court set out in *Gingles* for the successful maintenance of a vote dilution claim under the Voting Rights Act. The minority group must be able to demonstrate (1) that the group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. 478 U.S. at 50-51, 106 S.Ct. 2752.

[3] The Report lists the following factors:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

Judge Will conducted pretrial mediation, and a consent decree resulted. The decree abandoned the at-large election method and created a new system of government for both the City and the Park District. The new plan called for six single-member districts for the election of six City Council members and six park board commissioners, with a mayor and a park board president elected at large. Three of the districts would be majority white, two would be majority African-American, and one would have a majority population of African-American and Hispanic residents of voting age. The consent decree plan was based on the "strong mayor" form of government authorized by the Illinois Municipal Code, and it replaced a "commission" form of government. (The Code allows Illinois cities to select among several acceptable

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(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

[(8)] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

[(9)] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Sen. Judiciary Comm. Rept. at 28-29.

forms of government. The "aldermanic" form is the basic form, *see* 65 ILCS 5/3.1, but cities may expand upon the aldermanic form by adopting the "commission," *see* 65 ILCS 5/4 et seq., "managerial," *see* 65 ILCS 5/5 et seq., or "strong mayor," *see* 65 ILCS 5/6 et seq., forms. Cities may normally adopt, alter, or repeal a form of government only through a referendum. Ill. Const. Art. VII, § 6(f)).

In a development that would later prove problematic, the consent decree plan departed from the statutory "strong mayor" form in several respects. First, instead of five wards with two aldermen each, the decree called for six wards with one alderman each. Moreover, the mayor was authorized to appoint a city clerk and treasurer (persons usually elected at large), as well as administrative assistants and a budget and finance director (positions usually reserved for cities larger than Chicago Heights). The consent decree plan also modified the statutorily defined form of government for Illinois Park Districts. *See* 70 ILCS 1205/1-1 et seq. Rather than five commissioners elected at large, the decree called for six commissioners, one to be elected from each ward.

Judge Will approved the consent decree over the objections of Kevin Perkins and Robert McCoy ("the Individual Plaintiffs"), who had by this time split from their fellow class representatives. Perkins and McCoy thus appealed from the order entering the consent decree (with Harper, Elliott, the City, the Park District, and certain nominal defendants listed as appellees). *See Perkins*, 47 F.3d 212. This court found merit in their challenge and held that the district court should not have approved a consent decree that overrides state law without making

"properly supported findings that such a remedy is necessary to rectify a violation of federal law." *Id.* at 216 (emphasis removed). Absent a finding of a violation of federal law, a municipality may modify a statutorily prescribed form of government only through a referendum. We vacated the entire decree and remanded for further proceedings.

By the time the decision in *Perkins* was handed down (February 7, 1995), the City's 1995 general election was approaching. Judge Will ordered that the election should take place as scheduled, but in recognition of this court's concerns, he also directed that the consent decree should be submitted for voter approval through a referendum. At the same time, he noted that the Park District had passed a resolution adopting the new form of governance specified in the decree and thus that no further action was necessary legally to establish the new Park District structure. On November 7, 1995, Chicago Heights held a referendum and the voters approved the new form of city government – which was modeled on and identical to the form adopted in the earlier consent decree. Judge Will passed away shortly thereafter, and these cases, still on remand to the district court, were reassigned to District Judge Coar.

Following this court's instructions on remand, Judge Coar first reiterated that the old, at-large election method violated Section 2, and he made particularized findings to support this determination. *See Harper*, 1997 WL 102543, at *12. He noted that Judge Nordberg had found the *Gingles* factors satisfied; he then considered evidence and found that the Senate Report Factors also pointed to a Section 2 violation. Importantly, neither the City nor the

Park District have challenged this finding of liability in the present appeal. Next, Judge Coar considered the appropriateness of the remedy adopted first in the consent decree and later through referendum. (We refer in this opinion to the remedy Judge Coar evaluated for the City as the "referendum system," and to the remedy applicable to the Park District as the "resolution system," to reflect the fact that the systems under which both entities had operated at the outset of this litigation had been replaced by remedial measures.) Expressing concern that the referendum system preserved rather than remedied the effects of the former unlawful at-large laws, he ordered the parties to "propose new governmental structures and voting maps designed to remedy the underlying Voting Rights Act violations." Judge Coar allowed the City, the Park District, and the Class to rely on the referendum system for their proposals.

As requested, the parties submitted their proposals. The City, the Park District, and the Class reaffirmed their support for the referendum system, disagreeing only on where the lines dividing the six districts should be drawn. Perkins and McCoy objected to the solution adopted by consent and later by referendum, arguing that the six-member structure negates the power of the minority representatives because (1) in practice tie votes have frequently resulted, with the mayor (who is still elected at large) usually breaking the tie by voting with the white aldermen; and (2) the mayor may exercise veto power, which can be overridden only by a 3/5 majority of the council (i.e. four of the six aldermen). According to Perkins and McCoy, "the mayor now acts as a seventh alderman – indeed, a super alderman, who has the power

to appoint two important City positions and who is not elected from a single-member district, but rather, is elected at-large."

Perkins and McCoy proposed an "aldermanic" form of government with seven single-member districts and a mayor, city clerk, and treasurer elected at large. For reasons that are unclear, their plan too departed somewhat from the statutory aldermanic form, which calls for seven wards with two aldermen each for cities whose population is between 20,000 and 50,000. *See* 65 ILCS 5/3.1-20-10 & 5/3.1-20-15. Under the aldermanic form of government, the mayor votes in only two circumstances: to break a tie (a situation that simple mathematics indicates is less likely to occur with an odd number of aldermen), or where a super-majority is required by law. Perkins and McCoy proposed that lines be drawn to create three majority-white districts, two majority-black districts, one majority-Hispanic district, and one district in which no single group would be in the majority. For the Park District, Perkins and McCoy proposed a seven-member board (whose members would be elected from the seven districts), which would in turn elect a president from within its ranks.

After reviewing the proposals before him, Judge Coar rejected the referendum system because it still did not remedy the original Section 2 violation. *See McCoy v. Chicago Heights*, 6 F.Supp.2d 973, 981 (N.D.Ill.1998). Noting that "the parties do not explain how a government structure where the tie-breaking vote is elected at-large remedies a voting rights violation predicated on the fact that the at-large system enhanced discrimination against African-Americans," *id.* at 980, Judge Coar found his

concerns justified by the experience under that system that was accruing, which showed that where a tie has resulted in the city council, the mayor has voted with the white aldermen. (With an even number of aldermen, moreover, ties were not uncommon.) Judge Coar also noted that the mayor's authority was further enhanced by allowing him to appoint the city clerk and treasurer, as well as administrative assistants and directors. *Id.* None of those powers would have belonged to him under the statutory "strong mayor" government. Finally, Judge Coar criticized the use of an at-large method to elect the Park District board president. *Id.* Illinois law provides that the board president may be elected by the board members, but Judge Coar believed that the use of an at-large election is particularly problematic in a seven-member board structure where the president has the power to cast tie-breaking votes. *Id.*

Although Judge Coar suggested that the Perkins and McCoy proposal was legally adequate, *id.* at 981, he did not embrace it without qualification. He was concerned that a plan that requires the drawing of district lines would be the frequent subject of constitutional attack, recognizing that his task was to steer between the Scylla of racially based district lines, e.g., *Abrams v. Johnson*, 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997), *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), and *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), and the Charybdis of ineffectual Section 2 remedies. Noting the support for cumulative voting expressed by Justices Scalia and Thomas in Justice Thomas's concurring opinion in *Holder v. Hall*, 512 U.S. 874, 912, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), Judge

Coar decided to try that approach. Accordingly, instead of dividing the City into seven districts, the court's order requires the establishment of an at-large system that uses cumulative voting. This came as a surprise to the parties, who had not proposed any such structure, but the court cited to literature indicating that cumulative voting has the benefits of remedying the vote dilution problem while avoiding the constitutional challenges that afflict the drawing of district lines. 6 F.Supp.2d at 982-83. Judge Coar found this benefit significant given the line of Supreme Court decisions just mentioned, and also given the practical fact that any districting plan he approved would have to be redrawn following the 2000 census.

II

The City, the Park District, and the Class attack the district court's holding on several fronts. First, they argue that the court erred when it found that the referendum system did not remedy the Section 2 violation. Because the modified "strong mayor" plan adopted by the voters in the referendum is a legally adequate remedy, they maintain, the district court was required to accept it. They also suggest that the referendum results can be set aside only if they would independently violate Section 2, and that we should not be worrying about their capacity to cure the earlier Section 2 violation. Second, they argue that even if the referendum plan is an inadequate remedy, the district court's cumulative voting plan is not an acceptable alternative. Finally, the City and the Park District argue that all previous grants of attorneys' fees must be revisited. We address these contentions in turn.

A.

Standing behind the district court's judgment is the earlier finding – unchallenged, as we said – that the at-large system violated Section 2 of the Voting Rights Act. We think it was correct for the court to ask whether the replacement system eventually approved through referendum would remedy the violation; there was no need for the court to view it as if it had emerged from thin air. *See Harvell v. Blytheville Sch. Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir.1995); *Jenkins v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115-16 (3d Cir.1993). When a Section 2 violation has been found, the district court "must, wherever practicable, afford the jurisdiction an opportunity to remedy the violation first, . . . with deference afforded the jurisdiction's plan if it provides a full, legally acceptable remedy. . . . But if the jurisdiction fails to remedy completely the violation or if a proposed remedial plan itself constitutes a § 2 violation, the court must itself take measures to remedy the violation." *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n. 5 (7th Cir.1991) (citation and quotations omitted). We review the district court's factual findings regarding a Section 2 violation for clear error and its legal conclusions de novo. *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752. *See also Cousin v. Sundquist*, 145 F.3d 818, 822-23 (6th Cir.1998), cert. denied 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999).

The district court recognized that courts have relied upon the three factors set forth in *Gingles*, followed by the nine "Senate Report Factors," in order to decide whether or not a violation of Section 2 exists. *See*, e.g., *Jenkins v. Manning*, 116 F.3d 685, 690-92 (3d Cir.1997); *Dillard v. Crenshaw County, Ala.*, 831 F.2d 246 (11th Cir.1987). We

have no reason here to question that framework. Using it, Judges Nordberg and Will evaluated the original plan proposed to remedy the violation, but Judge Coar did not perform a similarly detailed evaluation of the referendum plan, largely because no one gave him the information he would have needed to do so. *See* 6 F.Supp.2d at 978. Instead, he decided that the findings that made the original system infirm were equally applicable to the referendum system. He noted that the problem with the old system was its use of at-large elections, which, given the local political environment, put the positions to be filled beyond the reach of minority voters. Under the plan adopted by the referendum, only the tie- breaker is elected at large, but taken as a whole this had the same diluting effect as the original at-large system. It was also significant that, because the voters had adopted the plan by referendum, the City had been operating under the plan for some time. This gave the court concrete evidence of the plan's effect in reality. That evidence showed that the at-large mayor voted with the white aldermen in the cases where a city council vote resulted in a tie. The court did not make any separate findings about the operation of the plan in Park District elections or governance.

The evidence of the mayor's pattern of voting in tie-breaking situations, taken with the likelihood of ties on an even-numbered council, is enough to support the district court's conclusion that the referendum system did not adequately address the acknowledged problem in the City elections. It is true, as the City points out, that the Supreme Court has held that at-large procedures are not unconstitutional per se. *See Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *see* also *United*

States v. Dallas County Comm., 850 F.2d 1433, 1438 (11th Cir.1988) ("[A]t-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme.") (citation and quotations omitted). Nonetheless, we are beyond that point here, given the state of this litigation. Appellate review might have been somewhat easier if the district court had discussed each of the *Gingles* and Senate Report Factors in its evaluation of the limited use of at-large procedures found in the referendum system, but the critical question in the end is whether the court's finding of fact that the newly enacted system would still discriminate against minority voters was clearly erroneous. The court pointed to the evidence that led it to conclude that vote dilution would still rise to the level of a Section 2 violation. Not everyone would agree, but we find the court's conclusion to be within the range of permissible inferences from this evidence, and hence not clearly erroneous. We therefore affirm the district court's rejection of the referendum system insofar as it is applied to the City.

With regard to the Park District, the absence of evidence of continuing discrimination is significantly more troubling. The Park District argues that the resolution system (derived like the referendum system from the consent decree) has solved its Section 2 violation: the board president regularly votes with a bloc consisting of two African-American board members, one Hispanic, and one white; further, capital improvement expenditures in African-American and Hispanic districts have increased substantially, suggesting that their residents' concerns are being addressed. Neither the district court's opinion nor the *McCoy* and *Perkins* brief addresses these contentions.

Because the burden of proving a Section 2 violation lies with the minority group contesting the current system, *see Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752, this lack of rebuttal evidence dooms the challenge to the use of the plan in the Park District. We reverse the district court's determination that the plan, as applied to the Park District, is not a legally adequate remedy.

B.

The question of the appropriateness of the court's chosen remedy is also a knotty one. On this point, our review is for abuse of discretion. *See Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) (appellate review of a district court's choice of remedy in a voting rights case is for abuse of discretion). Even though this gives great leeway to the judge who is closest to the problems, we are compelled to find here that the remedy for the City crafted by the court cannot stand at this time.

The district court's plan suffers from the same procedural flaw as did the consent decree when it was first presented to this court: the court's plan modifies the election methods set forth in the Illinois Municipal Code without either going through the statutorily required procedures for making such changes to electoral methods or making a judicial finding that it was necessary to make these changes in order to comply with federal law. As this court explained in *Perkins*, after a finding of a Voting Rights Act violation, the parties were free to adopt and the district court to approve

> one of the alternative forms of government provided by Illinois law. However, the parties cannot modify the chosen form simply at-will. . . . Any modifications which must be accomplished through a referendum cannot be made by the consent decree unless the court finds that the statutory provisions would violate federal law and that such changes are necessary to ensure compliance with federal law.

47 F.3d at 217.

The procedural holding in *Perkins*, while addressed to a slightly different problem, is equally applicable here, though we note that nothing in our earlier opinion disapproved of cumulative voting in the abstract. The Illinois Municipal Code makes available to cities a variety of election methods. The district court should either have selected one of these methods or found that the Illinois options violate federal law. Instead, as it had done before, it opted for a hybrid system without submitting that plan to the voters, as Illinois law would require, and without explaining why one of the State's authorized systems would not do the job. Although the Municipal Code allows for cumulative voting, it specifies that a city is to be divided into districts (not less than two and not more than six) and that each district is entitled to three aldermen. 65 ILCS 5/3.1-15-30 & 5/3.1-15-35. Without a finding that the Code's cumulative voting method violates federal law, the district court modified the plan to call for the city-wide election of seven council members.

The district court's plan also suffers from a failure to respect the City's preference for single-member districts.

The Supreme Court has held that in fashioning an electoral system to remedy a voting rights violation, courts "should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the . . . plans proposed by the state legislature, whenever adherence to state policy does not detract from the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973). Accordingly, when a legislative body fails to offer an acceptable remedy, "the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body." *Cane v. Worcester County, Md.*, 35 F.3d 921, 928 (4th Cir.1994).

Here, the City has demonstrated a clear preference for single-member districts. It proposed a remedial plan that relies on single-member districts and, in doing so, made a policy judgment about which electoral schemes are best suited for the locality. We should defer to the City's plan to the extent possible as long as it does not violate federal law. *See Cane*, 35 F.3d at 927. Although the district court found that the referendum system was inadequate, it did not find that any use of single-member districts violates federal law.

The United States, appearing as amicus curiae, defends the district court's plan on the ground that, under Illinois law, cumulative voting is an accepted electoral practice. Thus, the United States argues, while the district court's plan may have violated the City's preference for single-member districts, the State has no such preference. We find this distinction unconvincing. First,

the United States overstates the popularity of cumulative voting in Illinois: although cumulative voting is lawful under the Municipal Code, the use of single-member districts is an equally acceptable electoral practice. Moreover, although *Weiser* talks of deference to "state policy," a state plan was under attack in *Weiser*, and its holding is not so limited. The City proposed and must function under the remedial plan and accordingly its judgments are entitled to deference.

It is somewhat troubling that the City has not articulated why it prefers single-member districts over cumulative voting, but this is not an ironclad requirement for public bodies as long as the entity's actual preference can legitimately be inferred from facts on the record. It is obviously true that deference to legislative policy judgments is predicated on the legislature actually having made a policy judgment rather than an arbitrary choice. But we are satisfied that the City did so. Prior to the district court's order, the parties had never thought of cumulative voting. In the absence of a finding that cumulative voting is the only legally viable remedy, the City should have an opportunity to consider the merits and deficiencies of cumulative voting before that system is imposed upon it. We emphasize that our decision should not be understood as a condemnation of cumulative voting. Cumulative voting is, as the Illinois Municipal Code makes clear, a lawful election method that may be implemented under circumstances demonstrating suitable deference to the legislative body. It also has the virtues the district court identified:

> [R]ather than using race as a proxy for voting preference, such a system allows voters to draw

> their own jurisdictional boundaries, decide which local governments were most important to them, and allocate their votes accordingly. . . . All minority groups may potentially benefit from such a system – not just racial minorities . . . . Indeed, cumulative voting does not compartmentalize voters according to their race.

6 F.Supp.2d at 982-83 (quotations and internal citations omitted).

Because we reject the district court's remedy on other grounds, we need not address the City's contention that the decision to increase the number of City Council members from six to seven violates the rule of *Holder v. Hall, supra*, which holds that the size of a governing body is not subject to a Section 2 vote dilution claim.

III

The remaining issues pertain to the district court's orders awarding attorneys' fees and expenses pursuant to Section 14(e) of the Voting Rights Act, 42 U.S.C. § 1973(1)(e), and the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. The first award of attorneys' fees covers the period of time between the beginning of the suit and the entry of the consent decree. On December 15, 1994, Judge Will entered an order that awarded Class Counsel $337,777.98, with $297,930.65 attributable to the City and $39,847.33 to the Park District. This award included a 10% enhancement "to reflect the excellent results achieved." Although this court vacated the December 15 award along with the consent decree, on November 28, 1995, after the referendum, Judge Will re-entered the fee award. The Park District paid its portion.

The City initially appealed, but then reconsidered and asked us to dismiss the appeal. We granted the motion to dismiss, so there is currently no dispute as to the fees awarded by Judge Will.

Pending, however, are challenges to Judge Coar's order awarding fees and expenses. On March 26, 1999, Judge Coar awarded Class Counsel $55,665 to cover fees and expenses incurred after the entry of the consent decree. (On April 21, 1999, Judge Coar amended the order, increasing Class Counsel's award to $65,547.50.) Also on March 26, Judge Coar awarded Perkins and McCoy's attorneys $192,803.75; the City is responsible for $100,868.12 and the Park District for $91,935.63. Then on February 9, 2000, the court awarded fees in the amount of $11,065 to the attorneys representing *Perkins* and *McCoy*, for work done prosecuting their fee petition. The award does not specify how the fee award breaks down between the City and the Park District.

Both the City and the Park District filed appeals from all these orders; this court has consolidated the appeals that reached us after oral argument in this case with the original appeals. Although the City initially challenged Judge Coar's awards of attorneys' fees to the plaintiffs' counsel, it later asked that that appeal be dismissed. We granted the motion. Thus, remaining before us are the City's and the Park District's appeals of Judge Coar's March 26, 1999, fee award, which also provided the basis for the February 9, 2000, award of attorneys' fees to *Perkins* and *McCoy*.

First, the status of *Perkins* and *McCoy* as "prevailing parties" is at issue. The defendants then challenge the reasonableness of the fees awarded.

Section 1988 states that in a civil rights action, "the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of its costs." Because *Perkins* and *McCoy*'s status as a prevailing party involves elements of legal analysis, our review is de novo. *See Jaffee v. Redmond*, 142 F.3d 409, 412-13 (7th Cir.1998). The Supreme Court has stated that the statutory threshold for obtaining attorneys' fees under Section 1988 is "generous." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). To determine if a party is "prevailing," courts ask whether:

> the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit. . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas Teachers Ass'n v. Garland Independent Sch. Dist., 489 U.S. 782, 791-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (citation and quotations omitted). Once a plaintiff qualifies for a fee award by meeting this threshold, "the degree of the plaintiff's overall success goes to the reasonableness of the award . . . , not to the availability of a fee award vel non." *Id.* at 793, 109 S.Ct. 1486.

Perkins and *McCoy* are prevailing parties insofar as they succeeded in their goal of having vacated what they regarded as an ineffectual consent decree. That this court

did not vacate the decree based upon the precise arguments they raised, as the Park District points out, does not matter. They convinced this court that the decree was improperly entered, thereby succeeding on a "significant issue in [the] litigation." *Texas Teachers*, 489 U.S. at 791, 109 S.Ct. 1486. Recognizing this, the City chose not to appeal *Perkins* and *McCoy*'s prevailing party status so long as the substantive aspects of this case are upheld on appeal. (Because we are reversing some aspects of Judge Coar's decision, we note that the City has reserved its right to object to *Perkins* and *McCoy*'s status in later proceedings.) The Park District also argues that it should not be liable for any of the fees incurred by *Perkins* and *McCoy*, because they did not appeal the portions of the consent decree that applied to the Park District. *See Perkins*, 47 F.3d at 217. But the six-district structure also affected the Park District, and the final judgment of this court vacated the entire decree, not just parts of it.

These facts also persuade us that the Park District is being too particular when it asserts that *Perkins* and *McCoy*'s earlier appeal was not directed against it, and that it therefore should not be responsible for paying fees associated with that appeal. It is true that most of the appeal related to the City, but not all of it did. Judge Coar correctly recognized this on remand, when he reconsidered both the provisions applicable to the City and those applicable to the Park District. The greater problem for *Perkins* and *McCoy* is that we have now rejected their challenge to the Park District resolution that implements the earlier consent decree. The fees to which they are entitled from the Park District must therefore be reconsidered. The district court on remand should take into

account both whatever contributions they made to the liability findings against the Park District, and their lack of success in changing the remedy for the Park District.

Finally, both the City and the Park District challenge the reasonableness of the district court's fee award to *Perkins* and *McCoy*. They allege that (1) counsel for *Perkins* and *McCoy* failed to support their claimed hourly rates with sufficient evidence that the rates are reasonable; (2) counsel for *Perkins* and *McCoy* used reconstructed time records rather than records made at the time the services were rendered; and (3) counsel for *Perkins* and *McCoy* relied on "cluster billing," i.e. grouping several different activities into one description, thus making it impossible to determine whether the individual activities were a reasonable expenditure of time. The defendants maintain that these failings made it impossible for the district court to determine the reasonable value of the services provided. The City also raises a number of challenges to individual entries in the fee petitions. For example, it argues that one of the attorneys for *Perkins* and *McCoy* spent an unreasonable amount of time meeting with his clients.

We find no abuse of discretion in the court's decision to accept the proposed hourly rates. The reasonable hourly rate (or "market rate") for lodestar purposes is "the rate that lawyers of similar ability and experience in their community normally charge their paying clients for the type of work in question." *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 555 (7th Cir.1999) (quotations and citations omitted). The attorneys for *Perkins* and *McCoy* supported their proposed hourly rates with their own affidavits confirming the reasonableness of these rates as

well as affidavits from attorneys practicing in the field. While an attorney's self-serving affidavit alone cannot establish the market rate for that attorney's services, such affidavits in conjunction with other evidence of the rates charged by comparable lawyers is sufficient to satisfy the plaintiffs' burden. *Id.*

As to the reasonableness of the hours expended, when a fee petition is vague or inadequately documented, a district court may either strike the problematic entries or (in recognition of the impracticalities of requiring courts to do an item-by-item accounting) reduce the proposed fee by a reasonable percentage. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 651, 657-58 (7th Cir.1985); *see* also *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (if plaintiff fails to document hours adequately, court may reduce award accordingly). Whichever option the district court chooses, it is required to "provide a concise but clear explanation of its reasons for the fee award" that is sufficient to permit appellate review. *Ohio-Sealy Mattress*, 776 F.2d at 658, quoting *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933.

Perkins and *McCoy* acknowledge that their bills were compiled in part from contemporaneous time records and in part reconstructed. This use of reconstructed records does not doom their petition, as there is no per se rule requiring the submission of contemporaneous time records in the Northern District of Illinois. However, Judge Coar, who concluded that their time records "appear to be contemporaneous," did not address the reliance on reconstructed records. As it is within a district court's power to reduce a fee award because the petition was not supported by contemporaneous time records, *see*,

e.g., *Shakman v. Democratic Organization of Cook County*, 634 F.Supp. 895, 899 (N.D.Ill.1986); *Rybicki v. State Bd. of Elections of State of Illinois*, 584 F.Supp. 849, 861 (N.D.Ill.1984), we reverse and remand for reconsideration of this issue.

For the reasons discussed above, we AFFIRM the district court's holding that the current election method violates Section 2 of the Voting Rights Act as applied to the City; however, we REVERSE the district court's remedy and REMAND to the court to craft a suitable remedy. We REVERSE the district court's holding that the current election method violates Section 2 as applied to the Park District. We VACATE in part and AFFIRM in part the March 26, 1999, order and the February 9, 2000, order granting attorneys' fees and expenses. Specifically, we AFFIRM the district court's award of attorneys' fees to *Perkins* and *McCoy* from the City and VACATE and REMAND for calculation of the precise amount of fees. We VACATE and REMAND the award of fees to *Perkins* and *McCoy* from the Park District; should the district court determine on remand that *Perkins* and *McCoy* are entitled to fees for their suit brought against the Park District, it should reconsider the amount, taking into account this opinion. Finally, we do not disturb the award of fees to plaintiffs' counsel – the Park District did not appeal that award and we dismissed the City's appeal of that award on the City's motion. All parties shall bear their own costs attributable to this appeal.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

August 28, 2000

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

RON HARPER, KEVIN PERKINS, WILLIAM ELLIOT, and ROBERT MC COY,

Plaintiffs-Appellees/ Cross-Appellants,

Nos. 98-2785, 98-2811, 98-2899, 98-3004, 98-3051 98-3075, 99-2007, 99-2008, 00-1503 00-1515

v.

CITY OF CHICAGO HEIGHTS and the CHICAGO HEIGHTS ELECTION COMMISSION,

Defendants-Appellants/ Cross-Appellees,

and

CHICAGO HEIGHTS PARK DISTRICT, *et al.*,

Defendant-Appellant/ Cross-Appellee,

and

DAVID ORR COOK COUNTY CLERK,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 87 C 5112
No. 88 C 9800

David H. Coar, *Judge.*

ORDER

On reconsideration of the petition for rehearing and petition for rehearing *en banc* filed by counsel for the defendants-appellants/cross-appellees on August 10, 2000, all members of the original panel have voted to **DENY** the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby DENIED.

United States District Court
N.D. Illinois,
Eastern Division
Robert McCOY, Kevin Perkins, Ron Harper and William Elliot, Plaintiffs,

v.

CHICAGO HEIGHTS, Chicago Heights Election Commission, Defendants.
Robert McCOY, Kevin Perkins, Ron Harper and William Elliot, Plaintiffs

v.

CHICAGO HEIGHTS PARK DISTRICT and the Cook County Clerk, Defendants.

Nos. 87 C 5112, 88 C 9800.

May 28, 1998

Michael P. Seng, John Marshall Law School, Chicago, IL, J. Timothy Eaton, Theodore E. Harman, Ungaretti & Harris, Chicago, IL, James C. Craven, James C. Craven, P.C., Springfield, IL, for Plaintiffs in 87 C 5112.

Jon Gardner Crawford, Anthony Scariano, Scariano, Kula, Ellch & Himes, Chtd., Chicago, IL, for Defendants in 87 C 5112.

Michael P. Seng, John Marshall Law School, Chicago, IL, J. Timothy Eaton, Theodore E. Harman, Ungaretti & Harris, Chicago, IL, Robert L. Anderson, Robert J. Jenkins, Krohn, Jenkins & Anderson, Chicago, IL, for Plaintiffs in 88 C 9800.

James O. Nolan, Diane M. Baron, Clausen Miller, P.C., Chicago, IL, Robert K. Bush, Nancy L. Kaszak, Ancel, Glink, Diamond, Cope & Bush, P.C., Chicago, IL,

Anthony G. Scariano, Kelly Hayden, Scariano, Kula, Ellch & Himes, Chtd., Chicago Heights, Il, Cook County State's Atty., Chicago, IL, for Defendants in 88 C 9800.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

Currently pending are the parties' proposals for remedying the Section 2 Voting Rights Act violations found previously by this court. For the reasons stated in this Memorandum Opinion and Order, this court denies the proposals of the City, the Park District, and the class plaintiffs and accepts, in part, the proposal of the individual plaintiffs. As described herein, this court orders that the individual plaintiffs' proposal will be modified by implementing a system under which the aldermen and Park District members are elected at-large utilizing cumulative voting.

I. BACKGROUND

The instant case originated in 1987 and 1988 when the plaintiff class filed complaints on behalf of African-American voters of Chicago Heights against the defendants City of Chicago Heights ("City" or "Chicago Heights"), the Chicago Heights Election Commission, the Chicago Heights Park District ("Park District"), and Stanley Kusper, the Clerk of Cook County. The plaintiffs alleged that the non-partisan, at-large elections in Chicago Heights City Council and the Chicago Heights Park District Board violated Section 2 of the Voting Rights Act

of 1965, 42 U.S.C. § 1971 et seq., by diluting the opportunity of African-Americans to elect representatives of their choice. This case has a long and complicated procedural history and facts, which are reviewed in earlier opinions and therefore not necessary to review in detail here. *See Harper v. City of Chicago Heights*, 824 F.Supp. 786 (N.D.Ill.1993) (Will, J.); *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir.1995); *Harper v. City of Chicago Heights*, 1997 WL 102543 (N.D.Ill. March 5, 1997) (Coar, J.).

As discussed in earlier opinions, pursuant to a consent decree approved by Judge Will on May 24, 1994, the City and the Park District abandoned the at-large election method and created a new system of government. "[T]he new plan was designed around six single member districts for the election of six single member districts for the election of six City Council members and six Park Board Commissioners, with a mayor and Park Board president[1] elected at-large." *Harper*, 1995 WL 706898 at *1. The form of government prescribed in the consent decree was a deviation from the forms of government provided for in the Illinois Municipal Code. *See* discussion, infra, Part II.A.2, II.B.2.

Two of the named plaintiffs, Kevin Perkins and Robert McCoy (hereinafter "Perkins and McCoy" or "individual plaintiffs"), appealed the entry of the consent decree to the Seventh Circuit Court of Appeals, which vacated the decree and remanded the case. *See Perkins*, 47 F.3d at 218. The Seventh Circuit found that the parties did

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[1] The Park Board president serves as the seventh Board member.

not have the ability to consent to modifications in statutorily prescribed forms of government absent a finding that "such a remedy is necessary to rectify a violation of federal law. . . . Without such findings, however, parties can only agree to that which they have the power to do outside of litigation." *Id.* at 216. Subsequent to the Seventh Circuit's February 7, 1995 decision, on November 7, 1997, the form of government contained in the consent decree was approved by Chicago Heights voters in a referendum.

On remand, this court found that Judge Will's November 29, 1995 order and the stipulation and agreement satisfy the Seventh Circuit's directive to determine whether there was a violation of the Voting Rights Act. *See Harper*, 1997 WL 102543 at *3. This court further found that, under the at-large system previously in place, "few African-American candidates of choice were ever elected to the city council; the electorate was racially polarized; the at-large election system enhanced discrimination against African-Americans; and African-Americans were denied access to the slating process." *Id.* at *12. In addition, the evidence before this court demonstrated that African-Americans in Chicago Heights "bear the effects of historic discrimination in the areas of housing, employment, education, and public accommodations." *Id.* at *10. Accordingly, this court concluded that it was necessary to determine whether the consent decree sets forth a valid remedy for the City's and the Park District's Section 2 violations. The fact that the form of government provided in the consent decree has been "approved" pursuant to a referendum does not relieve this court of its

obligation to decide whether the consent decree remedies the underlying violation. *See id.* at *5.

This court ordered the parties to propose new governmental structures and voting maps designed to remedy the voting rights violations. *See id.* at *14. Subsequently, the City, the Park District, the class plaintiffs, and Harper and McCoy submitted memoranda and documents proposing new forms of government for the City and the Park District.

II. DISCUSSION

A. City of Chicago Heights

1. Forms of City Government

The form of government that was in place when the voting rights violation occurred was the commission form of government, which provided for a mayor and four council members elected at-large. *See* 65 ILCS 5/4-3-1. Under the commission form of government, the four candidates receiving the highest number of votes are elected to the council and elections are held every four years. Cumulative voting was not permitted under the Chicago Heights voting system. *See Harper*, 824 F.Supp. at 793 n. 4 (Ex. A, Report and Recommendation, Nordberg, J.).

The Illinois Municipal Code provides for three other forms of government beyond the commission form: (1) aldermanic; (2) managerial; and, (3) strong mayor. *See* 65 ILCS 5/1-1-1 et seq. The "aldermanic" form of government is the basic form of government available to cities in Illinois and is outlined in Article 3.1 of the Municipal Code. Cities may choose to expand upon the aldermanic

form of government by adopting the commission, managerial, or strong mayor forms of government. The numbers of aldermen prescribed by the different forms of government vary according to size of the city.[2] Chicago Heights has a total population of 33,072.[3]

Under the aldermanic form of government, cities the size of Chicago Heights are divided into seven wards, with two aldermen per ward. *See* 65 ILCS 5/3.1-20-10. The number of aldermen may be reduced to one per ward pursuant to a referendum. *See* 65 ILCS 5/3.1-20-20. The Code also provides for the adoption of a minority representation plan as a modification to the traditional aldermanic form of government. *See* 65 ILCS 5/3.1-15-35.

The managerial form of government provides for seven wards, with two aldermen per ward, in a municipality the size of Chicago Heights. *See* 65 ILCS 5/5-2-2. Under the strong mayor form of government, a city the size of Chicago Heights is allocated five wards, with two alderman from each ward. *See* 65 ILCS 5/6-3-3. The aldermanic, managerial, and strong mayor forms of government all provide for a city clerk and treasurer elected at-large. *See* 65 ILCS 5/3.1-15-5; 65 ILCS 5/5-2-19; 65 ILCS 5/6-3-3.

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[2] The commission form of government is an exception, providing for four commissioners regardless of the population of the city.

[3] *See Perkins and McCoy Mem.* at 2, citing Bureau of Census, Statistical Abstract, 1990.

2. Consent Decree

The type of strong mayor government adopted by the City in the consent decree is a modification of that outlined in the Municipal Code. First, instead of five wards with two alderman each as prescribed by Illinois law for the strong mayor government, the City has six districts with one alderman elected from each. *See* 65 ILCS 5/6-3-5 ("Every city shall have as many wards as one-half the total number of aldermen to which the city is entitled."). In addition, instead of electing the clerk and treasurer at-large, *see* 65 ILCS 5/6-3-3, these officers are appointed by the mayor and approved by the City Council. Also, the mayor currently appoints administrative assistants and a budget and finance director.[4]

B. Chicago Heights Park District

1. Forms of Government for Park District

The Illinois Park District Code provides that the five candidates who receive the most votes in an at-large election are elected commissioners of the Park District. *See* 70 ILCS 1205/2-9. By referendum or resolution of the Board, the Board may be comprised of seven commissioners.[5] *See* 70 ILCS 1205/2-10a. A Park District Board president may be elected at-large, *see* 770 ILCS 1250/2-15, or

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[4] The appointment of a budget and finance director is only statutorily authorized in the strong mayor form of government for cities of 50,000 or more. *See* 65 ILCS 5/6-4-15.

[5] In a district where a seven-member board is created, it may later be reduced to five members by referendum. *See* 70 ILCS 1205/2-10a.

elected from within their members by the elected commissioners, *see* 70 ILCS 1205/4-8. The Board president serves as a member of the board with the power to preside at meetings and call special Board meetings:

> The president of any park district shall preside at all meetings of the board, and shall call special meetings thereof of his own motion or on request of two or more of the members, and in case of a special meeting shall cause a notice to be given to all members as provided by the rule of said board. He shall have the right to vote upon all questions coming before the board and shall be a member thereof.

70 ILCS 1205/4-9.

2. Consent Decree

The consent decree made the following changes to the Park District governmental structure that was in place at the time of the voting rights act violations: the number of Board members is increased from five to seven; the terms are decreased from six to four years; six of the board members are elected from six wards rather than at-large; and, the Board president is elected at-large rather than by the other board members. As is clear from the discussion in the previous subsection the governmental structure provided for the Park District in the consent decree is a modification of the statutorily prescribed form. *See Perkins*, 47 F.3d at 215. In particular, the Illinois Park District Code does not allow for Board members to be elected from individual districts.

C. Fashioning a Remedy

1. Question Under Review

This court must now decide whether the form of government put in place as a result of the consent decree and subsequent referendum provides a complete and adequate remedy to the Section 2 violation found in this case. As an initial matter, the defendants argue that the proper focus for this court is not whether the new form of government remedies the prior violation of the Voting Rights Act, but rather whether the new form of government is, itself, a violation of the Voting Rights Act. (City Mem. at 11.) According to the defendants, absent a determination that the system implemented by the consent decree and referendum constitutes a separate violation of the Voting Rights Act, this court may not disturb the present form of government. However, the defendants have misread this court's earlier opinion. *See Harper*, 1997 WL 102543 at *12. In that opinion, this court found that the previous government did violate the Voting Rights Act and therefore this court must review de novo whether the form of government detailed in the consent decree is an adequate remedy.

The fact that the present form of government was approved by the voters in a popular referendum does not satisfy the defendants' burden on review. As the Supreme Court has held:

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly

> the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act.

Lucas v. Forty-Forth [sic] *General Assembly of Colorado*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1473-377, 12 L.Ed.2d 632 (1964). *See also Harvell v. Blytheville School Dist.*, 126 F.3d 1038, 1040 (8th Cir.1997) ("The district court need not defer to a state-proposed remedial plan, however, if the plan does not completely remedy the violation or if the plan itself violates Section 2 of the Act.") (citing *Williams v. City of Texarkana, Ark.*, 32 F.3d 1265, 1268 (8th Cir.1994)).

2. Standard for Judicial Remedy

"Once a right and a violation has [sic] been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *U.S. v. Paradise*, 480 U.S. 149, 183-84, 107 S.Ct. 1053, 1072-74, 94 L.Ed.2d 203 (1987) (internal quotations and citations omitted). "In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 847 (5th Cir.1993) (citing *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982)). Therefore, any remedy ordered by the court must be a tailored remedial response to illegality. *See Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). *See also Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n. 5 (7th Cir.1991) ("[A]ny court remedy must be

narrowly tailored to include only those measures necessary to cure the effect."). In fashioning a remedy, a district court should not "intrude upon state policy any more than necessary." *Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971).

3. Proposals of the Parties

a. Proposals of the City, Park District, and Class Plaintiffs

The City, Park District, and class plaintiffs propose that this court adopt the forms of government for the City and the Park District that are included in the consent decree. The City, Park District, and class plaintiffs agree that the government should be based on a six-district structure, with a modified strong mayor government for the City and a seven-member Park District Board, with the Board president elected at-large. The parties disagree, however, on where the lines dividing the six districts should be drawn.

The Park District and the class plaintiffs argue that the district lines should be drawn as indicated in the consent decree. Curiously, neither the Park District nor the class plaintiffs have provided the court with a block map outlining the districts, statistics indicating the racial composition of each district, or arguments why the lines as drawn are constitutionally permissible. Obviously, this oversight makes it difficult for the court to weigh the ability of the proposed districts to remedy the voting rights violation. The court is aware, however, that the district lines as drawn have resulted in the election of

three white, two African-American, and one Latino aldermen. (Perkins/McCoy Mem. at 8.) Therefore, the racial percentage breakdown of aldermen is 50 percent white, 33.3 percent African-American, and 16.7 percent Latino. The mayor, who is elected at-large, is also white. At the present time there are two African-Americans, one Latino, and four whites (including the president) on the Park District Board. (Park Dist. Mem. at 6.) Respectively, the Board is 57.1 percent white, 28.6 percent African-American, and 14.3 percent Latino.[6]

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[6] According to official census data, the total population of the City of Chicago Heights is 33,072, with 54.8 percent white, 34.8 percent African-American, and 15 percent Latino. (Perkins/McCoy Exhibit 2 at 6.) The City claims that the total population of Chicago Heights is 33,072, with a racial breakdown of 54.8 percent white, 34.8 percent African-American, and 9.7 percent Latino. However, as the City does not cite a source for its data, the court may not verify this statistic. The total voting age population of Chicago Heights is 22,961, with a racial breakdown of 57.36 percent white, 29.77 percent African-American, and 12.87 percent Latino. *See Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir.1984) ("Because minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote . . . [w]hen voting age population data are available and the district court accepts them as reliable, it seems reasonable for such data to be used in evaluating minority voting strength . . . "). Although the Seventh Circuit has recently held that citizen voting age population is the proper benchmark for measuring proportionality of districts, the parties do not provide the court with any statistics regarding the citizen voting age population. *See Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir.1998), petition for cert. filed, May 12, 1998. The 2000 census will undoubtably alter the current statistics regarding the racial makeup of the City.

The City is also in favor of a six-district plan, but argues that the lines should be drawn in a different manner. Again complicating this court's ability to compare the plans, the City does not cite a source for its statistical analysis of Chicago Heights, which varies significantly from that proposed by Perkins and McCoy using official census reports. The City's plan would create two majority African-American districts and four majority white districts. (City's Proposed Six District Map; McCoy Aff. at 2.) The City's proposed districts differ from the current scheme supported by the class plaintiffs and the Park District primarily in terms of its effect on Hungry Hill. The City's plan would decrease the minority population in Hungry Hill, primarily through a substantial reduction in the Latino population. According to the City's statistics, the voting age population in Hungry Hill would be 28 percent Latino, 14 percent African-American, and 59 percent white. (City's Proposed Six District Map.) The City's statistics do not account for the non-citizen population among Latinos, which would no doubt result in further dilution of the Latino vote.[7] The class plaintiffs object to the redrawing of the district lines proposed by the City and argue that the City's proposal will dilute the minority representation in the city council by making it

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[7] *See supra* note 6.

unlikely that a Latino could be elected to the council.[8] (Class Pls.' Response at 2.)

b. Proposal of Perkins and McCoy

The present governmental structure as well as the present district lines are objected to by Perkins and McCoy. The individual plaintiffs propose that the city adopt an Article 3.1 aldermanic form of government with seven single-member districts and a mayor, city clerk, and city treasurer elected at-large. Under the aldermanic form of government, the mayor presides over meetings but only votes in the case of tie votes or where a super-majority is required. *See* 65 ILCS 5/3.1-40-50. The mayor also has veto power, which can be overridden by the council. *See* 65 ILCS 5/3.1-40-45, 50. According to the Perkins/McCoy plan, each elected official would serve a four-year term. For the Park District, Perkins and McCoy propose the creation of a seven-member board, which would elect a Board president from within its ranks.

The districting lines proposed by Perkins and McCoy create seven districts: two majority African-American, three majority white, one majority Latino, and one district in which no single group is in the majority. (Perkins/McCoy Mem. at 13.) In terms of voting age population,

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[8] Although the instant case is brought by African-American plaintiffs, this court must remain mindful of the effect of any proposed remedy on the Latino voting population. *See U.S. v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) (finding that one of the factors that a court must consider in determining whether a remedy is narrowly tailored is the "impact of the relief on the rights of third parties.").

the McCoy/Perkins districts provide for two majority African-American districts, four majority white districts, and one Latino "influence" district.[9] (Perkins/McCoy Ex. C.)

Perkins and McCoy allege that, the current system negates the power of the African-American and Latino representatives because, under the six-member structure, tie votes have frequently resulted, with the mayor breaking the tie by voting with the white aldermen. Furthermore, under the modified strong mayor government the mayor may exercise veto power, thereby further diluting the power of the minority voters. In addition, the mayor appoints the clerk and treasurer and has the power to hire and fire in certain departments. According to the individual plaintiffs, "the mayor now acts as a seventh alderman – indeed, a super-alderman, who has the power to appoint two important City positions and who is not elected from a single-member district, but rather, is elected at-large." (McCoy/Perkins Mem. at 9.) The individual plaintiffs argue that the current system ensures that non-white aldermen cannot approve legislation without white support. However, white aldermen can approve everything without non-white support. McCoy and Perkins present similar concerns regarding the Park District's governmental structure and its effect on the African-Americans' ability to elect a Board president or effect real change in the Park District.

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[9] In the Perkins/McCoy plan, Hungry Hill has a voting age population that is 44.1 percent Latino, 10.8 percent African American, and 45 percent white.

4. Analysis of Proposals of the Parties

a. Form of Government

As this court noted in its earlier opinion, the City's switch to "strong mayor, weak council form of government in which the mayor appoints the heads of two important city departments is an odd way to remedy a voting rights violation." *Harper*, 1997 WL 102543 at *13. In addition, this court indicated that there was nothing in the record in support of the argument that a strong mayor form of City government or a Park District government with a Board president elected at-large "remedied rather than preserved the effects of the prior system." *Id.* Furthermore, the record indicated that "the current form of government creates a stalemate between minority and non-minority representatives on the city council, while shifting power to the mayor, who is elected at-large." *Id.*

Despite this court's earlier warnings, the parties arguing in favor of the governments provided in the consent decree do not present the court with support for their argument that the consent decree remedies the Section 2 violation. In particular, the parties do not explain how a government structure where the tie-breaking vote is elected at-large remedies a voting rights violation predicated on the fact that the at-large election system enhanced discrimination against African-Americans. By adopting a curious variant of the strong mayor government, the mayor in Chicago Heights is provided powers that exceed those present in other statutory forms of Illinois government. He is able to vote on legislation in the case of a tie, or where a vote greater than a majority is required. *See* 65 ILCS 5/6-4-5. In these tie situations

which have resulted, the mayor has voted with the white aldermen. (McCoy Aff. at 3.) In addition, the mayor may veto ordinances passed by the council, which may only be overridden by a three-fifths majority of the council. *See* 65 ILCS 5/6-4-2, 3. The mayor's power is further increased by allowing him to appoint both the city clerk and the city treasurer. *See McCoy Aff.* at 2. Other significant mayoral powers that are peculiar to the strong mayor government include the ability "[t]o appoint and remove his administrative assistants, budget and finance director, heads of all departments, and to appoint and remove all other officers of the municipality, commissions, boards and agencies . . . "; "[t]o exercise control of all departments and divisions . . . "; "[t]o attend all meetings of the council with the right to take part in the discussions . . . "; and, "[t]o recommend to the council for adoption such measures as he may deem necessary or expedient." 65 ILCS 5/6-4-7.

The Park District government in the consent decree is also a strange remedy for a voting rights violation. Despite the fact that the Illinois Park District Code provides that the Board president need not be elected at-large, the remedy in the consent decree for vote dilution caused by the at-large voting system was to allow the Board president to be elected at-large. This result is particularly problematic in a seven-member board structure, where the president has the power to cast tie-breaking votes.

The district court need not defer to a state-proposed remedial plan if the plan does not completely remedy the violation or if the plan itself violates Section 2 of the Act. *See Williams v. City of Texarkana, Ark.*, 32 F.3d 1265, 1268

(8th Cir.1994). This court finds that the modified strong mayor government is not a complete remedy to the Section 2 violation, nor is the remedial plan proposed by the Park District. Notably, by granting significant power to the mayor and Board president who are both elected at-large, the proposed systems perpetuate the race-based violation of the Voting Rights Act that occurred in the previous at-large voting system. *See*, e.g., *Dillard v. Crenshaw County, Alabama*, 831 F.2d 246 (11th Cir.1987) (finding that a proposal for restructuring election scheme for county commission which allowed for an at-large election of the chairperson violated the Voting Rights Act); *Harvell v. Blytheville School Dist.*, 126 F.3d 1038, 1040 (8th Cir.1997) (finding that a 5-2 system proposed by the school district in which five members would be elected from districts and two members would be elected at-large is not an adequate remedy to remedy a voting violation caused by an at-large system: "[t]he inability of black voters to affect the at-large elections under the 5-2 plan is no different from what it was under the previous electoral scheme"); *Buchanan v. City of Jackson*, 683 F.Supp. 1537, 1545 (W.D.Tenn.1988) (Todd, J.) (rejecting a proposed remedy in which six commissioners would be elected from districts and three would be elected at-large because "the potential would remain for the election of an administration that is unresponsive to the needs of the black community"). *See generally Thornburg v. Gingles*, 478 U.S. 30, 49, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986) (finding that at-large systems "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters").

The City, Park District, and class plaintiffs do not propose any alternate remedy for the voting rights violations. Therefore, this court turns to the remedy proposed by the individual plaintiffs Perkins and McCoy. In terms of the City government, this court is in agreement with the individual plaintiffs that a traditional aldermanic form of government would reduce the power of the mayor, who is necessarily elected at-large. One significant difference between these forms of government is that in the aldermanic form a mayor's veto may be overridden by a two-thirds vote of the aldermen, whereas in the strong mayor format a three-fifths majority is required. Compare 65 ILCS 5/3.1-40-50 with 65 ILCS 5/6-4-3. While it is true that both the aldermanic government and the strong mayor government allow the mayor to cast tie-breaking votes, compare 65 ILCS 5/6-4-5 with 65 ILCS 5/3.1-40-30, the Perkins/McCoy proposal provides for seven aldermen, thus ensuring that tie votes will not result.[10] Even the City agrees that the creation of six districts, as provided in the City's plan, "may provide more opportunity for even splits by the aldermen . . . " (City Mem. at 7.) Another significant difference is that the modified strong mayor government proposed by the City and the class plaintiffs allows the mayor to appoint the city clerk and city treasurer; however, in the aldermanic form of government these officers would be elected at-large. *See* 65 ILCS 5/3.1-20-5.

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[10] Seven single-member districts is a permissible variant of the aldermanic form of government under the Illinois Municipal Code. *See* 65 ILCS 5/3.1-20-20.

For similar reasons, this court looks favorably upon the structure of the Perkins and McCoy proposal for the Park District. Rather than perpetuating the dilution of the minority voting strength by electing the Board president at-large, Perkins and McCoy suggest that the president be selected by the seven elected council members. This system would increase the voice of minority voters by not allowing the at-large member to cast tie-breaking votes. Furthermore, the election of the Board president from within the elected Board members is clearly allowed under Illinois law. *See* 70 ILCS 1205/4-8.

In conclusion, this court finds that the remedies proposed by the City, Park District, and class plaintiffs do not adequately address the Section 2 violation. "This court cannot authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation." *Crenshaw County*, 831 F.2d at 252. In contrast, the Perkins/McCoy remedy for governmental structure offers a more complete remedy, yet is not without its own problems. In particular, this court is troubled by the potential of the seven-district structure to be challenged on Equal Protection grounds.

b. Drawing District Lines

Although the Perkins/McCoy proposal is a satisfactory remedy with regards to the governmental structures for the City and the Park District, this court is hesitant to divide Chicago Heights into seven districts. The Supreme Court has held that race must not be a predominant factor in drawing district lines. Voter classifications based upon race are considered suspect and therefore subject to

strict scrutiny if they subordinate traditional districting criteria to race. *See*, e.g., *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

Thus, fashioning a remedy that will draw district lines so as to remedy a voting rights violation, but without making race a predominant factor, is a complicated undertaking. The opponents of the Perkins/McCoy plan have justifiably argued that the creation of seven wards with the predominant intent of racial gerrymandering runs the risk of being challenged on an Equal Protection basis. Creating majority-minority districts as a remedy to voting rights violations inevitably relies on "a quintessentially race-conscious calculus aptly described as the 'politics of second best.' " *Johnson v. De Grandy*, 512 U.S. 997, 1020, 114 S.Ct. 2647, 2661, 129 L.Ed.2d 775 (1994) (Souter, concurring) (citing B. Grofman, L. Handley & R. Neimi, Minority Representation and the Quest for Voting Equality, 136 (1992)). Thus emerges the paradox of fashioning a voting rights remedy based on districts in voting remedy cases. As one district court has aptly noted, any remedial plan "(even one fashioned solely with race-neutral principles) must be ultimately tested by whether it cures the § 2 violation, . . . race will always be a factor, for the ultimate question is whether the proposed plan provides the complaining racial group (in this case, African-Americans) equal access to the political process within the context of § 2." *Dillard v. City of Greensboro*, 946 F.Supp. 946, 955

(M.D.Ala.1996) (Thompson, C.J.). Finally, any redistricting plan that this court may approve would be subject to continued constitutional challenges and would require being redrawn after the 2000 census.

5. Cumulative Voting

a. Cumulative Voting Defined

Thus, while this court favors a seven-member structure for the Park District and City, seven, single-membered districts would not [sic] an effective remedy for the Section 2 violation in Chicago Heights. However, a drawing of district lines is not required in order to remedy the voting rights violation in Chicago Heights. Rather than dividing the city into seven districts, this court finds that a system of at-large voting that utilizes cumulative voting, in combination with the Perkins/McCoy plan, would successfully remedy the voting rights violation.

Cumulative voting as a remedy functions in the following manner:

> Voters receive as many votes to cast as there are seats to fill; voters then may distribute these multiple votes among minority candidates in any way they prefer. Thus, voters may "plump" all their votes on one candidate – the strategy of choice for minority groups with intense preferences for a particular candidate – or give one vote each to several candidates. If five seats on a city council are to be filled, voters would have five votes each to distribute as they saw fit.

Richard Pildes & Kristen Donoghue, Cumulative Voting in the United States, 1995 U. Chi. Legal F. 241, 254

(1995). *See* generally Richard L. Engstrom, Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution, 21 Stetson L.Rev. 743 (1992); Edward Still, Alternatives to Single Member Districts, in Chandler Davidson, ed., Minority Vote Dilution 249 (1989). Cumulative voting is frequently used to elect directors of corporations as a strategy for ensuring representation of minority shareholders in the board. *See* Harry Henn & John Alexander, Laws of Corporations, (3d Ed.1983) at 495-97. In fact, most states permit cumulative voting for corporations, allowing the individual corporation to elect whether to utilize the voting scheme. *See* Robert Clark, Corporate Law § 9.1 at 362 (1986).

If a cumulative voting system were applied to the Perkins/McCoy plan, the seven aldermen and seven Board members would be elected at-large using cumulative voting, rather than electing one alderman and Board member from each district as proposed by Perkins and McCoy.[11] Each voter would be allocated seven votes to use as he or she chooses. Thus, the voter could use all seven votes to elect one candidate, or distribute the votes among several candidates. The seven candidates with the highest number of votes would be elected to office.

There are several distinct advantages to a system of regionwide cumulative voting for local office. In particular, rather than using race as a proxy for voting preference, such a system allows voters to "draw their own

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[11] As previously noted, the voting system in place when the voting rights violation occurred did not permit cumulative voting. Harper, 824 F.Supp. at 793 n. 4. (Ex. A, Report and Recommendation, Nordberg, J.).

jurisdictional boundaries, decide which local governments were most important to them, and allocate their votes accordingly." Richard Briffault, The Local Government Boundary Problem in Metropolitan Areas, 48 Stan. L.Rev. 1115, 1156 (1996) (footnote and citation omitted). All minority groups may potentially benefit from such a system – not just racial minorities. For example, in a region where Republicans are in a minority, cumulative voting could allow them to elect a candidate of choice. As one commentator has suggested:

> In a multi-seat election, voters can aggregate their votes to reflect the intensity of their preferences. Because voters, depending on their interests, can form coalitions that cut across racial lines, this form of political arrangement diminishes the likelihood of reifying race as a fixed, political category. Members of different racial groups who enter into such alliances are more likely "to find confidence-building measures that build trust and overcome antagonism."

Lani Guinier, (E)Racing Democracy, 108 Harv. L.Rev. 109, 133 (footnote omitted). Relevant to the instant case is the fact that cumulative voting would allow minority voters in Chicago Heights, including the African-Americans and Latinos, to elect candidates of choice without creating race-conscious district lines that would be subject to constitutional challenge. Indeed, cumulative voting does not compartmentalize voters according to their race: "the state does not directly single out any particular minorities for special protection through concentration into 'safe' districts." Pildes & Donoghue, *supra*, at 255.

b. Federal Court Precedent

The Supreme Court has held that single-member districts are, in general, favorable to at-large voting plans and muti-member [sic] districts. *See*, e.g., *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993) (citations omitted). However, the Supreme Court has also consistently held that at-large procedures are not unconstitutional per se. *See*, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S.Ct. 498, 499, 13 L.Ed.2d 401 (1965). A few Justices have argued that district-based elections represent a political choice and are not necessarily the only suitable remedy for a voting rights violation. *See*, e.g., *Davis v. Bandemer*, 478 U.S. 109, 160, 106 S.Ct. 2797, 2824, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring). Thus, although single-member districts may be preferred, they are not by any means an exclusive remedy to voting rights violations. *See*, e.g., *Dillard v. Town of Cuba*, 708 F.Supp. 1244 (M.D.Ala.1988) (Thompson, J.) (approving a limited voting scheme as a § 2 remedy); *Dillard v. Chilton County Board of Education*, 699 F.Supp. 870 (M.D.Ala.1988) (Thompson, J.) (approving a cumulative voting scheme as a § 2 remedy), aff'd, 868 F.2d 1274 (11th Cir.1989); *Cane v. Worcester County, Maryland*, 847 F.Supp. 369, 373 (D.Md.1994) (Young, J.) (ordering a cumulative voting system as a remedy to a § 2 violation).[12]

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[12] The court ordered the following cumulative voting plan as a remedy for a Voting Rights Act violation: "Each voter may cast up to five votes in a Commission election, and may cumulate his or her votes for one or more chosen candidates.

Indeed, in a recent Voting Rights Act case, Justices Thomas and Scalia suggested that cumulative voting is a "more efficient and straightforward mechanism for achieving what has already become our tacit objective: roughly proportional allocation of power according to race." *Holder v. Hall*, 512 U.S. 874, 912, 114 S.Ct. 2581, 2601, 129 L.Ed.2d 687 (1994) (Thomas, J. concurring, joined by Scalia, J.). Although it is by far the most common remedy for a Voting Rights Act violation, geographic districting is not a requirement of our political system:

> The decision to rely on single-member geographic districts as a mechanism for conducting elections is merely a political choice – and one that we might reconsider in the future. Indeed, it is a choice that has undoubtedly been influenced by the adversary process: In the cases that have come before us, plaintiffs have focused

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Winning candidates are the top five who receive the most votes of all Commission candidates seeking office." *Id.* at 371 n. 4. On appeal, the district court's remedy was vacated based on the Fourth Circuit's conclusion that the district court, by immediately ordering the implementation of a cumulative voting scheme, "had deprived the County of an adequate opportunity to submit a remedial plan." *Cane v. Worcester County*, 35 F.3d 921, 928 (4th Cir.1994), cert. denied, 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995). However, the Fourth Circuit limited its decision to the facts of the case, thus leaving open whether a cumulative voting plan may be a proper remedy in some circumstances. *Id.* at 928 ("We are not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision. Our review is limited by the specific facts and circumstances presented here, and under them, the district court abused its discretion in adopting the cumulative voting scheme proposed by Plaintiffs.").

> largely upon attacking multimember districts and have offered single-member schemes as the benchmark of an "undiluted" alternative. But as the destructive effects of our current penchant for majority-minority districts become more apparent, courts will undoubtedly be called upon to reconsider adherence to geographic districting as a method for ensuring minority voting power. Already, some advocates have criticized the current strategy of creating majority-minority districts and have urged the adoption of other voting mechanisms – for example, cumulative voting or a system using transferable votes – that can produce proportional results without requiring division of the electorate into racially segregated districts.
>
> . . . Such changes may seem radical departures from the electoral systems with which we are most familiar. Indeed, they may be unwanted by the people in the several States who purposely have adopted districting systems in their electoral laws. But nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes. As some Members of the Court have already recognized, geographic districting is not a requirement inherent in our political system.

Id. at 909-11, 114 S.Ct. at 2600-01 (1994) (footnotes and citations omitted).

c. One-Person, One-Vote

This court finds that a system of cumulative voting complies with the requirements that the court be mindful of the "one-person, one-vote" requirement of the Equal Protection Clause. According to this principle, courts must equalize the populations in each district as nearly as is practicable. *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964). By allowing each voter the same number of votes, cumulative voting subscribes to the one-person, one-vote requirement with numeric exactness. *See*, e.g., *Guinier, supra*, at 135-36 (finding that cumulative voting is consistent with the one-person, one-vote concept). In contrast, all of the proposals submitted by the parties would result in unequally weighted votes given the variance in the size of the districts and the impossibility of estimating voter turnout and exact populations of districts.

d. Illinois Voting Principles

Cumulative voting also conforms with Illinois' traditional voting principles. The fact that cumulative voting as a remedy has strong roots in Illinois is important given that the Supreme Court has held that district courts should not "intrude upon state policy any more than necessary" in fashioning remedies for voting rights violations. *Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971).

Illinois was the first state to introduce a cumulative voting system. *See Henn & Alexander, supra*, at 495 n. 12. Cumulative voting for directors of corporations was

introduced in Illinois in 1870. *See id.* In addition, cumulative voting was adopted by the Illinois Constitutional Convention of 1869-70 as a device to assure minority representation in the legislature. *See* Charles Hynerman & Julian Morgan, Cumulative Voting in Illinois, 32 Ill. L.Rev. 12, 13 (1937). The main reason for the adoption of the cumulative voting system "was a desire to correct the situation wherein southern Republicans and northern Democrats were going unrepresented in the legislature." *Id.* (footnote omitted). Under this system, three representatives were elected for two-year terms from 51 different districts. Voters could cast one vote for three candidates, one and one-half votes for two candidates, or one vote for one candidate and two votes for a second candidate. *See id. See* also Ill. Const. of 1870, art. IV, §§ 6, 7, 8. The cumulative voting system in Illinois corporations is still prescribed in some situations, *see* Henn & Alexander, *supra*, at 495 n. 13; however, cumulative voting for the legislature was repealed in 1980, *see Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1088 n. 17 (N.D.Ill.1982).

Cumulative voting nonetheless remains firmly established as a statutory form of city government in Illinois. As previously noted, the Illinois Municipal Code provides for a form of cumulative voting in a variant of the aldermanic form of government. Under the minority representation plan:

> [E]ach elector may cast as many votes as there are aldermen to be elected in the elector's district, or may distribute his or her votes, or equal parts of the votes, among the candidates as the elector sees see [sic] fit. The candidate highest in votes is elected if only one alderman is to be

elected; the candidates highest and next highest in votes are elected if only 2 aldermen are elected; the 3 highest candidates in votes are elected when 3 aldermen are to be elected. 65 ILCS 5/3.1-15-35.

III. CONCLUSION

In conclusion, this court orders that the City of Chicago Heights and the Chicago Heights Park District implement the governmental forms discussed in this Memorandum Opinion and Order. In accordance with the Perkins/McCoy plan, the City must adopt an aldermanic form of government, as provided in Article 3.1 of the Illinois Municipal Code. The City will have a total of seven aldermen, who will be elected at-large by cumulative voting for four-year terms. The voting procedure will be as outlined in this opinion – a modified form of the "minority representation plan" provided for by Illinois law in the aldermanic form of government. Each voter will be allocated seven votes to use as he or she chooses, and the seven candidates with the most votes will be elected to office. The mayor, city treasurer, and city clerk will be elected at-large.

The Park District is ordered to adopt a seven-member Board which will elect the Board president from among its ranks, as provided in the Illinois Park District Code. The seven members of the Board will be elected at-large by cumulative voting for four-year terms. Accordingly, voters will be given seven votes to cast for the Park

District Board and the seven candidates with the highest number of votes will be elected to office.

It is so ordered.

United States Court of Appeals,
Seventh Circuit.

Kevin PERKINS and Robert McCoy, Plaintiffs-Appellants,

and

Ron Harper and William Elliot, Plaintiffs-Appellees,

v.

CITY OF CHICAGO HEIGHTS, Chicago Heights Election Commission, Chicago Heights Park District, et al., Defendants-Appellees.

No. 94-2491.

Argued Dec. 9, 1994.

Decided Feb. 7, 1995.

Michael P. Seng, Chicago, IL, James E. Craven, Donald M. Craven (argued), Springfield, IL, for Ron Harper, William Elliot.

Robert L. Anderson (argued), Krohn, Jenkins & Anderson, Chicago, IL, for Kevin Perkins, Robert McCoy.

James J. Casey, Kai A. Nebel, Kathleen M. O'Laughlin, Keck, Mahin & Cate, Anthony G. Scariano, Raymond A. Hauser (argued), Jon Gardner Crawford, Kelly A. Hayden, Scariano, Kula, Ellch & Himes, Chicago, IL, for City of Chicago Heights, Chicago Heights Election Com'n, Stanley Kusper.

James J. Casey, Kai A. Nebel, Kathleen M. O'Laughlin, Edward M. Kay, James T. Ferrini, Susan Condon, Imelda Terrazino, Clausen, Miller, Gorman, Caffrey & Witous, Anthony G. Scariano, Chicago, IL, for Chicago Heights Park Dist.

Before FLAUM, EASTERBROOK, and ROVNER, Circuit Judges.

FLAUM, Circuit Judge.

Two named plaintiffs in a class action appeal a consent decree entered in a Voting Rights case as violative of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Because the parties to the consent decree lacked the authority to assent to it, and the requisite findings of federal law violations necessary for the district court to approve the decree were not established, we now vacate that decree.

I.

Kevin Perkins and Robert McCoy, plaintiffs-appellants in the instant case, and Ron Harper and William Elliot (all together the "Class"), filed a Complaint for Injunctive and Other Equitable Relief against the City of Chicago Heights and the Chicago Heights Election Commission on June 8, 1987. The complaint alleged that Chicago Heights' non-partisan, at-large district wide elections used to elect representatives to the Chicago Heights City Council violated section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1971 et seq., by diluting the opportunity of African-Americans to elect representatives of their choice. On November 17, 1988, the Class filed a complaint alleging similar violations against the Chicago Heights Park District and Stanley Kusper, Clerk of Cook County, Illinois.

On January 29, 1988, the Class filed a Motion to Maintain a Class Action and for Certification of the Class

supported by affidavits of Harper, Elliot, McCoy and Perkins. This motion was formally granted on April 18, 1994, with the class defined as:

> All African-American citizens of the United States residing in the geographic confines of 1) The City of Chicago Heights, or 2) The Chicago Heights Park District.

Regarding the six-year delay in granting class certification, Judge Will, to whom the case had been transferred from Judge Nordberg, stated:

> I talked to Judge Nordberg, and Judge Nordberg was of the opinion that he had certified the class way back when, when the motion for class certification was originally filed. . . . Well, he said I certainly intended to. And if I didn't it was an omission, and I am perfectly agreeable to your certifying the class now since that's what I intended to do.
>
> Since it made sense to me to certify the class, because this was a class action from day one, and all that happened was that Judge Nordberg hadn't entered the order which he thought he had entered, and therefore I certified the class sometime ago at this point.

In February, 1989, all parties moved for summary judgment. On January 28, 1992, Magistrate Judge W. Thomas Rosemond, Jr. issued a Report and Recommendation suggesting that the district court should grant summary judgment for the Class on the following issues: 1) whether the African-American community in Chicago Heights was sufficiently compact and contiguous to form a voting age population majority in two of seven districts;

and 2) whether voting in Chicago Heights was racially polarized.

Judge Nordberg adopted the Magistrate Judge's findings on May 14, 1993. In addition, Judge Nordberg entered summary judgment for the Class on the issue of whether the white majority in Chicago Heights voted sufficiently as a block to defeat usually the African-American community's preferred candidates. The court did not enter a finding of liability against the defendants, however, finding instead that genuine issues of material fact still existed as to the following questions: 1) whether the at-large system in Chicago Heights enhanced discrimination against African-Americans; 2) whether African-Americans were denied access to the slating process; 3) whether African-Americans were the victims of official discrimination in the form of political gerrymandering; and 4) whether African-Americans bore the effects of historic socioeconomic discrimination in the areas of housing, employment, education, and public accommodations that hindered their ability to participate effectively in the Chicago Heights political process.

The parties filed an Agreed Motion to Consolidate the two cases against Chicago Heights and against the Park District. The court granted that motion on September 13, 1993. The case was reassigned to Judge Will, who held pretrial mediation conferences with the parties, all of whom submitted proposed voting maps. As a result of these negotiations the parties agreed to a consent decree that included a new voting map consisting of six single member districts and revised forms of government for the City and the Park District. On January 6, 1994, Perkins and McCoy filed a motion objecting to their being

disregarded as named plaintiffs during settlement negotiations. Judge Will denied this motion as lacking justification the same day.

The parties held a public hearing on April 25, 1994, at the Chicago Heights Municipal Building. The proceeding was taped, transcribed, and presented at a fairness hearing conducted by Judge Will on May 18, 1994. Judge Will approved the parties' consent agreement and entered findings of fact, conclusions of law and a judgment order on May 24, 1994. The consent decree changes the City's form of government from a "Managerial Form of Municipal Government," 65 ILCS 5/5-1-1 et seq., to a "Strong Mayor Form of Municipal Government," 65 ILCS 5/6-1-1 et seq. Pursuant to the consent decree, Chicago Heights will have a mayor elected at-large. 65 ILCS 5/6-3-3. However, the consent decree modifies the statutory Strong Mayor Form of Government in several ways. First, instead of having 5 wards with 2 aldermen elected from each ward, 65 ILCS 5/6-3-3 and 6-3-5, Chicago Heights will have 6 districts with one alderman elected from each. Furthermore, instead of electing the City Clerk and Treasurer, 65 ILCS 5/6-3-3, the mayor will appoint people to fill those positions and the City Council will confirm them. Finally, although only statutorily authorized for municipalities with populations above 50,000, 65 ILCS 5/6-4-12 and 5/6-4-13, Chicago Heights, a city of approximately 33,000, will have administrative assistants to the mayor, as well as a Budget and Finance Director, all to be appointed by the mayor and to work at his pleasure.

The consent decree also modifies the statutorily defined form of government for Illinois Park Districts. *See* 70 ILCS 1205/1-1 et seq. Among other things, the decree

calls for six Commissioners, one from each district, to be elected to four-year terms, rather than five Commissioners to be elected at-large to six-year terms. The decree also provides for a Commission President to be elected at-large. Finally, the consent decree states that the Chicago Heights Park District Board "shall" pass a resolution, as allowed by 70 ILCS 1205/2-10a and 2-12a, mandating that the Board will consist of seven Commissioners elected to four-year terms.

Perkins and McCoy moved for a new trial, which the district court denied. This appeal followed.

II.

Perkins and McCoy argue that the consent decree violates the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Specifically, Perkins and McCoy contend that the six districts have a population variance of more than 10% and fail to respect traditional natural and political boundaries. *See Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), modified, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969). In addition, Perkins and McCoy maintain that the modification of the statutory Strong Mayor Form of Government dilutes their voting power by ordering six instead of five districts and by mandating the appointment rather than election of the City Clerk and Treasurer. Alternatively, they argue that the changes to the statutory form are illegal. Finally, Perkins and McCoy assert that the consent decree is invalid because the other

named plaintiffs, Elliot and Harper, failed to represent the Class adequately and because there is insufficient evidence to prove that the Class was certified before 1994. Because we believe that the parties did not have the ability to consent to the modifications contained in the consent decree, we vacate the decree and remand.[1]

While parties can settle their litigation with consent decrees, they cannot agree to "disregard valid state laws," *People Who Care v. Rockford Bd. of Educ.*, 961 F.2d 1335, 1337 (7th Cir.1992); *Kasper v. Bd. of Election Com'rs of City of Chicago*, 814 F.2d 332, 341 (7th Cir.1987), and cannot consent to do something together that they lack the power to do individually. *Kasper*, 814 F.2d at 341-42. We have previously recognized that "[s]ome rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them," *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir.1986), but they may not do so by agreeing to do something state law forbids. Because a consent decree is not just an agreement between two parties, but is also a judicial act, district

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[1] Although done regrettably late, we find no prejudicial error in the district court's delay in certifying the Class. All parties treated the case as a class action from the beginning and the Judges involved believed that a formal order to that effect had been entered. The court eventually certified the Class, before the court approved the consent decree. Nothing in the record persuades us either that the Class was not properly certified or that Elliot and Harper did not adequately represent the Class. We therefore find Perkins and McCoy's arguments to the contrary without merit.

courts must ensure that the consent decrees they approve respect this principle as well as the rights of third parties. *EEOC v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir.1985), cert. denied, 478 U.S. 1004, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986); *South v. Rowe*, 759 F.2d 610, 613 n. 3 (7th Cir.1985).

Once a court has found a federal constitutional or statutory violation, however, a state law cannot prevent a necessary remedy. Under the Supremacy Clause, the federal remedy prevails, "[t]o hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them." *Missouri v. Jenkins*, 495 U.S. 33, 57-58, 110 S.Ct. 1651, 1666, 109 L.Ed.2d 31 (1990). Thus, upon properly supported findings that such a remedy is necessary to rectify a violation of federal law, the district court can approve a consent decree which overrides state law provisions. Without such findings, however, parties can only agree to that which they have the power to do outside of litigation. As we have stated before, "[a]n alteration of the statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law." *Kasper*, 814 F.2d at 342 (emphasis added); *see* also *Ragsdale v. Turnock*, 941 F.2d 501, 515 (7th Cir.1991) (" '[T]he appropriate relation between state and national power' . . . is one in which federal judges employ their equitable powers to enjoin the enforcement of state statutes only after they have determined that these statutes contain some constitutional deficiency.") (Flaum, J., concurring in part and

dissenting in part) (emphasis in original) (citation omitted), cert. denied, 502 U.S. 1035, 112 S.Ct. 879, 116 L.Ed.2d 784 (1992); *Overton v. City of Austin*, 748 F.2d 941, 957 (5th Cir.1984) ("Absent a properly grounded judicial determination that the present charter provisions are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition.").

The Illinois Constitution states that home rule units, such as Chicago Heights:

> shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, . . . A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. . . .

Ill. Const. Art. VII, § 6(f) (emphasis added). Therefore, a change to the Strong Mayor Form of Government, and at least certain modifications to that statutory system, must normally be accomplished through a referendum. The district court, in approving the consent decree, stated that "this Consent Decree and Order is supported by a significant basis in evidence and law, and its measures are narrowly tailored to achieve the necessary remedy." The decree states that it should not be construed as an admission of liability by Chicago Heights. These generalized statements do not constitute sufficient findings of a violation of federal law and cannot adequately form the basis for the modifications of the Illinois statutory forms of government. Therefore, absent particularized findings, the decree could not direct changes normally requiring

voter approval and we must vacate the decree and remand for further proceedings.[2]

On remand, the parties may either attempt to reach a new agreement in light of our discussion above or may proceed to trial. If they choose the former option, the parties can, after a finding of a Voting Rights Act violation, adopt, and the district court can approve, one of the alternative forms of government provided by Illinois law. However, the parties cannot modify the chosen form simply at-will. Remedies that override state law must be narrowly tailored so as to infringe state sovereignty as minimally as possible. *Jenkins*, 495 U.S. at 57-58, 110 S.Ct. at 1666-67. Federal remedial powers can "be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and extent of the violation." *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 399, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982). Any modifications which must be accomplished through a referendum[3] cannot be made by the consent

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[2] Because we vacate the decree we do not reach Perkins and McCoy's other contentions, which may be rendered moot by further proceedings.

[3] *See Dunne v. County of Cook*, 108 Ill.2d 161, 90 Ill.Dec. 866, 868, 483 N.E.2d 13, 15 (1985) (suggesting that the number of districts and number of members from each district would be an alteration necessitating a referendum). In addition, the appointment, rather than election, of the City Clerk and Treasurer would constitute a decision on the manner of selection of officers, if those positions are "officers" within the constitutional meaning of the term. We note that one court has stated that a city can, consistent with the Illinois Constitution, first alter a statutory form by ordinance and then adopt that form through a referendum. *Flowers v. City of Moline*, 251

decree unless the court finds that the statutory provisions would violate federal law and that such changes are necessary to ensure compliance with federal law. In that case, appropriate changes need not be postponed until a violation actually occurs.

Park districts, on the other hand, are not home rule units subject to Article VII, § 6. As "special districts" they are "units of local government," Ill. Const. Art. VII, § 1, for which:

> The General Assembly shall provide by law for the transfer of assets, powers, and functions . . . in connection with the formation, consolidation, merger, division, dissolution and change in the boundaries of
>
> . . . .

Ill. Const. Art. VII, § 12. The Constitutional Commentary to this section states that it is designed to "provide by law for the implementation of changes in the organization and boundaries of units of local government." (emphasis added) Thus, the organization of the Chicago Heights Park District can normally only be altered in the ways and by the methods authorized by the Illinois General Assembly. The Illinois Revised Statutes allow the Park District Board to change the number of Commissioners

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Ill.App.3d 348, 190 Ill.Dec. 628, 631, 622 N.E.2d 38, 41 (1993). Assuming that all changes can be approved of in a single referendum does not mean that all possible alterations can also be made in a consent decree. Rather, the parties must do only what is necessary to remedy any federal law violation and must submit all other desired changes to the City's voters for approval.

and terms of office by board resolution or by referendum. 70 ILCS 1205/2-10a and 2-12a. The statutes mention nothing, however, about electing Commissioners from districts rather than at-large. Absent a specific finding that the Park District system violates the Voting Rights Act and that such changes are necessary to remedy that violation, the district court erred in approving this portion of the consent decree.[4]

Perkins and McCoy argue that we must vacate the consent decree because its districts and modifications violate the Voting Rights Act and the United States Constitution, or in the alternative that the six districts it mandates violate the Illinois statutory requirement of five districts. *See* 65 ILCS 5/6-3-6. Perkins and McCoy do not, however, argue that the Illinois Constitution and our precedent such as *Kasper* require our result today. The Class-appellees contend that such absence constitutes a waiver of the argument.[5] We do not agree. Perkins and

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[4] The consent decree provides that any provision found to be unconstitutional can be severed from the remainder of the decree. Our decision, however, necessarily requires vacating the entire decree.

[5] In their Motion for a New Trial, Perkins and McCoy argued that the modifications to the Strong Mayor Form of Government and Park District organization so derogated from the statutory forms as to be illegal. The City's attorney assured the district court that municipalities can make such alterations in order to settle Voting Rights litigation. Our discussion above establishes otherwise and we have found no authority to the contrary. We further note that no party apprised the district court of the Illinois constitutional provisions on which we have relied.

McCoy's alternative argument minimally sufficed to preserve the issue for appeal; their failure to cite the correct cases simply created the risk that we would not find them. *See*, e.g., *Elder v. Holloway*, 510 U.S. 510, ___, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994). In any event, Perkins and McCoy did not appeal the portions of the consent decree relating to the Park District and, while we often hold arguments waived, in this case, where the district court approved a consent decree that modified a form of government without the state-mandated voter approval and without making the requisite findings of violations of federal law necessitating such changes, we will not find waiver. Perkins and McCoy have standing to appeal the decree and we refuse to "prolong the injury caused by [the] consent decree arrived at through an unfair process by failing to invalidate it sooner rather than later," when a different aggrieved party may make the argument. *Ragsdale*, 941 F.2d at 512 (Flaum, J., concurring in part and dissenting in part). As a federal court, we "must preserve the appropriate relation between state and national power," *Id.* at 515 (citing *Kasper*, 814 F.2d at 340), a task we cannot ignore simply because Perkins and McCoy failed to make the correct legal argument.

For the foregoing reasons, we vacate the consent decree and remand for further proceedings.

VACATED.